SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 624

THE UNITED STATES, PETITIONER,

vs.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
General traverse	7	3
Argument and submission of case	7	3
Special findings of fact	9	4
Conclusion of law	21	14
Opinion, Howell, J.	21	14
Dissenting opinion, Whitaker, J.	34	24
Note re exhibits	35	25
Judgment	37	25
Clerk's certificate (omitted in printing)	39	
Defendant's Exhibit No. 13—Summary and annual profit and loss statements of the Toronto, Hamilton & Buffalo Navigation Company, 1916 through 1942	40	26
Order allowing certiorari		28

1 In the Court of Claims of the United States

No. 46435

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY, an Ohio Corporation, PLAINTIFF.

vs.

THE UNITED STATES, DEFENDANT

Petition—Filed May 15, 1945

To the Honorable, the Chief Justice and Judges of the Court of Claims of the United States:

The plaintiff, The Toronto, Hamilton and Buffalo Navigation Company, presents this, its petition, for the adjudication of its claim upon implied contract for the payment of just compensation resulting from the requisition and appropriation at Ashtabula, Ohio, on August 20, 1942, by the defendant, represented by the War Shipping Administration, of the Car Ferry "Maitland No. 1," Official No. 214213. To that end plaintiff invokes the jurisdiction conferred upon the Court of Claims by Acts of Congress of March 3, 1887, Chapter 359; of March 3, 1911, Chapter 231; and Section 902(2) and Section 902(d) of the Merchant Marine Act of 1936 (U. S. C. A. Title 28, Section 250, Title 46, Section 1242(a) and Section 1242(d)). Plaintiff respectfully alleges and shows to the Court:

2 1. At all times mentioned herein the plaintiff was, and still is, a corporation organized and existing under the laws of the State of Ohio, having an office at 466 Lexington Avenue, New York 17, New York, and prior to August 20, 1942 was engaged in the business of ferrying railroad cars across Lake Erie to and from the ports of Ashtabula, Ohio, and Port Maitland, Ontario.

The plaintiff further, upon information and belief, alleges:

2. By Executive Order No. 9054, dated February 7, 1942 (7 Federal Register 837), as amended by Executive Order No. 9244, dated September 16, 1942 (7 Federal Register 7327), issued pursuant to the authority of the First War Powers Act approved December 18, 1941 (U. S. C. A. Title 50, Appendix Section 601), there was established a War Shipping Administration under the direction of an Administrator appointed by and responsible to the President. By such Executive Orders the functions, duties and powers conferred by law upon the United States Maritime Commission with respect to the operation, purchase, charter, insurance, repair, maintenance, and requisition of vessels and facilities required for the operation thereof and the issuance of warrants with respect thereto

under the Merchant Marine Act of 1936, as amended (U. S. C. A. Title 46, Chapter 27); the Act of June 6, 1941 (Public Law 101, 77th Congress, U. S. C. A. Title 50, Appendix Sections 1271-1275, inclusive); the Act of July 14, 1941 (Public Law 173, 77th Congress, U. S. C. A. Title 50, Appendix Sections 1281-1286, inclusive); were transferred to such Administrator.

3. On August 20, 1942, the President having on May 27, 1941 proclaimed an unlimited national emergency, the United States of America by said War Shipping Administrator requisitioned, took over and appropriated pursuant to the aforesaid powers the plaintiff's car ferry "Maitland No. 1," Official No. 214213, gross tons
3 2757, net tons 1653, equipped with four single ended Scotch boilers with 175 pound pressure and two triple expansion engines of three cylinders each, developing an indicated horse power of 2500 to drive twin screws and designed for use of coal as fuel, with a steel hull of extra strength and design for ice breaking in the Great Lakes which was divided into seven watertight compartments below a single steel deck, upon which was erected the steel superstructure, and including a Sperry gyro compass, a radio direction finder, a depth sounding device, McNab indicators, electric refrigeration, a fifty person capacity lifeboat and other accessories, fittings, furnishing and equipment. The said car ferry was duly registered and enrolled and appropriate documents showing unconditional ownership of said car ferry in the plaintiff were on or about August 20, 1942 duly furnished to the defendant.

4. The fair value of the car ferry "Maitland No. 1" at the time and place the same was so requisitioned and the just compensation to which the plaintiff is entitled for the taking thereof by the defendant is the sum of $766,128.00.

5. The defendant on April 20, 1943, acting pursuant to the provisions of Section 902 of the Merchant Marine Act of 1936, as amended (U. S. C. A. Title 28, Section 1242(d)) offered to pay to the plaintiff the sum of $72,500.00 as just compensation for, and the fair value of, the car ferry "Maitland No. 1," seized and appropriated by it, as aforesaid, but said offer was rejected by the plaintiff with the request that the defendant pay to the plaintiff, pursuant to the provisions of the Merchant Marine Act, 75 per centum of the amount offered. Thereafter, and on or about June 10, 1944, the defendant paid to the plaintiff the sum of $54,375.00 as part payment for the car ferry "Maitland No. 1," its appurtenances and equipment, without prejudice, however, to the right of the plaintiff to secure to itself the payment of additional
4 compensation as the fair value of, and just compensation for, the seizure, taking and appropriation of the said vessel.

6. The plaintiff is justly entitled to the sum of $711,753.00 from the United States as the fair value of the said vessel and the just compensation payable in consequence of the taking thereof after allowing all just credits and offsets.

7. No action has been taken upon the claim set forth in this petition by Congress or by any of the departments of the Government except as herein stated.

8. Plaintiff is, and at all times mentioned herein has been, the sole, absolute and unconditional owner of the legal title to the claim herein presented. Plaintiff has made no assignment or transfer of said claim or any part thereof or any interest therein.

9. Plaintiff has at all times borne true allegiance to the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government and the plaintiff believes the facts as stated in this petition to be true.

WHEREFORE, the plaintiff prays for judgment against the United States pursuant to law for the sum of $711,753.00, together with such interest and costs as may be allowed by law.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY,
By GUSTAVE H. HOWE,
Treasurer.

FREDERICK L. WHEELER,
Attorney for Plaintiff,
466 Lexington Avenue,
New York 17, New York.

5-6 *Duly sworn to by Gustave H. Howe. Jurat omitted in printing.*

7-8 GENERAL TRAVERSE—Filed June 25, 1945

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed. OK J. F. S.

(S) FRANCIS M. SHEA,
Assistant Attorney General.

ARGUMENT AND SUBMISSION OF CASE

On April 5, 1948, the case was argued and submitted on merits by Mr. Frank J. Mahony for plaintiff, and by Mr. Kendall M. Barnes for defendant.

9 SPECIAL FINDINGS OF FACT, CONCLUSION OF LAW AND OPINION OF THE COURT BY HOWELL, J. DISSENTING OPINION BY WHITAKER, J.—Filed December 6, 1948

Mr. Frank J. Mahony for the plaintiff. *Messrs. Frederick B. Wheeler* and *C. Austin White* were on the brief.

Mr. Kendall M. Barnes, with whom was *Mr. Acting Assistant Attorney General H. G. Morison*, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

SPECIAL FINDINGS OF FACT

1. The plaintiff is a corporation, organized under the laws of the State of Ohio and having an office located in New York, New York. On and prior to August 20, 1942, it was the sole owner of the vessel known as the *Maitland No. 1*.

2. On August 20, 1942, the War Shipping Administration, acting pursuant to the Merchant Marine Act of 1936, as amended (46 U. S. C. 1242) requisitioned title to and possession of the *Maitland No. 1*. Within a short time thereafter, the War Shipping Administration removed the machinery from the vessel and sold the hull to a purchaser who converted it into a barge.

3. On April 20, 1943, the War Shipping Administration fixed the sum of $72,500 as just compensation for, and the fair value of, the *Maitland No. 1* and plaintiff was given prompt notice of this determination.

4. On December 21, 1943, plaintiff notified the defendant that the amount fixed by it as just compensation for the vessel was unsatisfactory to plaintiff and that it had elected to receive
10 75 percent of the amount awarded by the defendant and to reserve its right to sue the United States to recover such further sum as, added to the said 75 percent, would make up an amount that would be just compensation for the vessel. On June 10, 1944, the defendant paid plaintiff the sum of $54,375, being 75 percent of the amount determined by the defendant as just compensation.

5. No sum beyond said $54,375 has been paid to plaintiff by the defendant on account of the requisition of the *Maitland No. 1*. However, on October 4, 1943, the War Shipping Administration paid plaintiff the sum of $302.84, being the value of and just compensation for the consumable stores and expendable equipment aboard the vessel at the time she was requisitioned. The value of such consumable stores and equipment is not in issue in this action.

6. The *Maitland No. 1* was designed and built by the Great Lakes Engineering Works in 1916. It was a car ferry, constructed for the carriage of railway freight cars on the Great Lakes. It was a two masted, two stacker, conventional type, twin-screw vessel with a steel hull. The vessel had an over-all length of 350 feet, a beam of 56 feet, and a moulded depth to the car deck of 20 feet, 6 inches, with a clearance between the car and spar decks of 17 feet, 7 inches. Her gross tonnage was 2,757 tons and she was powered by two triple-expansion reciprocating steam engines, having cylinders 19½ inches, 31 inches, and 52 inches in diameter and with pistons having a 36 inch stroke. She had four Scotch boilers, fired by coal to operate at a maximum steam pressure of 175 pounds.

The vessel was equipped with auxiliary engines, motors and pumps, anchor and anchor chains, windlass, capstans, steering gear, intercommunicating and telegraph systems, mast head, range and search lights, a car headlight and two lifeboats.

There were four railroad tracks on the car deck, having a capacity of 30 freight cars of the size in use in 1916, but of only 26 of the larger sized freight cars in use in 1942.

In addition to quarters for firemen and coal passers on the car deck, the spar deck had 32 separate rooms, including the pilot house, wireless room, captain's office, six officers' staterooms, two staterooms for passengers, 9 rooms for the stewards and
11 crew, an officers' dining room, two mess rooms for the crew, four baths and lavatories, a galley, a pantry, a store room and a refrigerator.

7. The *Maitland No. 1* was constructed for Mr. L. N. Beckley, who was the president of plaintiff. The approximate cost of constructing the vessel was $362,800. This amount was based on the cost records of the builder plus an arbitrary addition for overhead and profit. In August 1916, the plaintiff acquired the *Maitland No. 1* from Mr. Beckley at a cost of $394,560.

8. From 1917 to 1930, plaintiff expended $38,115.46 for additions and betterments to the vessel. These improvements and additions included an enclosed, noncapsizable lifeboat purchased in 1921 at a cost of $6,016.55; the installation of an ice-making machine and the building of three additional rooms on the spar deck in 1926 at a cost of $6,400; a direction and revolution indicator installed in 1927 at a cost of $619.21; a gyrocompass and course recorder purchased in 1927 for $4,449.21; a Haynes sounding machine acquired in 1927 for $6,532.98; improvements to the ballast system in 1927 at a cost of $7,651.10 and a direction finder purchased in 1930 at a cost of $2,000.00.

9. From October 1916 to June 1932, plaintiff operated the *Maitland No. 1* on Lake Erie, between the ports of Ashtabula, Ohio,

and Port Maitland, Canada, a distance of 91 miles. The vessel was capable of making three round trips every two days and carried commodities loaded in freight cars moving between points in the Pittsburgh area, served by the New York Central Railroad, and points in Canada, served by the Toronto, Hamilton and Buffalo Railway Company. The car ferry afforded a short cut from the rail route, which moved around the end of Lake Erie and through the congested Buffalo area. The use of the ferry reduced the length of time the freight cars were in use for carrying the merchandise with which they were loaded.

In 1936 all of the stock of the plaintiff company was acquired by the New York Central and the Toronto, Hamilton and Buffalo Railway Companies.

10. The *Maitland No. 1* was the only vessel owned and operated by the plaintiff on its car ferry line. Plaintiff's chief source of revenue was derived from the transportation of bituminous
12 coal from the Ohio Customs District to Canada and its annual income over the sixteen and one-half year period of operation fluctuated in accordance with the tonnage of coal carried by the car ferry.

From August 12, 1916, to June 30, 1932, plaintiff's annual average net income from the *Maitland No. 1*, after deducting Federal income taxes, amounted to the sum of $36,368.64. This income provided plaintiff with an annual return on its investment of 8.85 percent. However, under standard accounting practices, income taxes are not regarded as operating expenses but as a distribution of earned income. Plaintiff's average annual income during the same period, without deduction for Federal incomes taxes, amounted to $42,816.36. On this basis, plaintiff's average annual income amounted to 10.41 percent of its investment.

Defendant's exhibit No. 13, which is made a part hereof, is a statement of the plaintiff's net operating income, exclusive of Federal income taxes, for each of the years during which the *Maitland No. 1* was operated by plaintiff. For the first four and one-half years (August 12, 1916 to January 1, 1921) the average annual net operating income from the *Maitland No. 1* was $17,216.28. In 1921 and 1922, the car ferry was operated at a net loss. During the next five years (1923 to 1928), the net operating income from the *Maitland No. 1* was at its highest level during the entire period the car ferry was in use, averaging $129,893.92 per annum. Beginning in 1928, the net operating income declined sharply below the 1927 earnings. This downward trend continued in 1929 and the vessel was operated at a net loss in 1930, 1931, and 1932. By June 1932, which was the low point of the financial depression which began in 1929, traffic handled by the *Maitland No. 1* had decreased to

the extent that plaintiff laid up the vessel, and the operation of the car ferry line was never resumed after that date.

11. The sharp decline in plaintiff's net operating income from the *Maitland No. 1* in 1928 and 1929 was contrary to the trend of earnings of Class I railroads in this country during the same period. In 1928 and 1929, the freight revenues of Class I railroads of the United States were in excess of their 1927 revenues.

Also, the exports of bituminous coal from the Ohio Customs
13 District to Canada were greater in 1928 and in 1929 than in 1927.

The reasons for this reduction in revenue, which began in 1928 and resulted in the discontinuance of operations in 1932, were set out in an application which plaintiff filed with the Interstate Commerce Commission on February 11, 1943, for leave to abandon its car ferry line. The application was filed after the defendant had requisitioned the *Maitland No. 1*, and the first reason for abandonment stated in plaintiff's petition, was the fact that the only vessel owned by plaintiff had been requisitioned by the War Shipping Administration. The second ground for abandonment, as stated by plaintiff, was:

> 2. Since June 1932, when the vessel operation ceased, there has been insufficient traffic available to justify the operation. Cross-lake traffic to Canadian rail heads dropped off upon the opening of the new Welland Canal in 1932 because larger vessels could take cargoes directly from Lake Erie to Lake Ontario ports. Traffic handled over the route moves on a slower schedule than if handled all-rail through Buffalo, New York. Identical rates are applicable over the two routes.

In its answer to the questionnaire filed by plaintiff with the Interstate Commerce Commission in connection with the application, the plaintiff also stated as follows:

> 15A. The traffic over the line decreased to such an extent that service was suspended on June 28, 1932. Prior to 1928 the bulk of the traffic handled consisted of bituminous coal for movement to the Steel Company of Canada at Hamilton, Ontario. In August, 1928, this traffic was diverted to Sodus Point, New York, for movement across Lake Ontario to Hamilton. When the new Welland Canal was opened in August, 1932, most of the remaining traffic was lost since vessels formerly unable to navigate the old Canal were enabled to take shipments directly to Lake Ontario points, by-passing Port Maitland without using the facilities of the applicant or its connecting rail line in Canada.

* * * * *

17A. No effort has been made to dispose of the line so as to insure continued operation since traffic is not available in sufficient quantities to warrant continued operation, even if a suitable car ferry were available. The all-rail routes are adequate and convenient.

14 12. On June 30, 1932, the *Maitland No. 1* was laid up at her dock at Ashtabula, Ohio, and was never used thereafter as a car ferry. Plaintiff did not operate the vessel for any purpose after June 30, 1932, but on November 29, 1935, plaintiff chartered her to the Nicholson Universal Steamship Company. The charterer covered the tracks on the vessel with planking and used her for carrying freight across Lake Michigan, between Milwaukee, Wisconsin, and Muskegon, Michigan. It was discovered that this transaction was in violation of Section 27 of the Merchant Marine Act of 1920 (46 U. S. C. 883), which prohibits the transportation of merchandise by water between two ports of the United States in vessels owned by persons who are not citizens of the United States.

In view of that statute, plaintiff and the Nicholson Universal Steamship Company made an agreement by which the title to the *Maitland No. 1* was transferred to the Nicholson Steamship Company on February 10, 1936, for a total consideration of $166,000. In the contract of sale, plaintiff retained the right to "recapture" the vessel within a specified period of time. At the time the sale was made, plaintiff intended to reacquire title to the vessel.

Plaintiff exercised its right of "recapture" on December 15, 1937, on which date the Nicholson Universal Steamship Company transferred title to the vessel to plaintiff for $92,894.80. Thereafter, the *Maitland No. 1* was moored at Ashtabula, Ohio, until it was requisitioned by the defendant.

13. During the eight-year period the *Maitland No. 1* was laid up at Ashtabula, Ohio, before she was requisitioned, the captain and chief engineer remained on board as shipkeepers. One of the boilers was fired up every winter and the engines were turned over periodically. The main and auxiliary engines were kept lubricated, the bright work was greased and minor repairs, of the kind needed to keep the vessel from deteriorating, were made from time to time. The chief engineer was authorized to hire any additional help required for such repair work.

From January 1, 1922 to June 30, 1932, while the *Maitland No. 1* was in use on the ferry line, plaintiff's average annual expenditure for repairs to the vessel was $20,329.11.

15 There is no evidence with respect to the cost of repairs or lay-up expenses for the vessel from June 30, 1932, to December 15, 1937.

From January 1, 1938, to August 20, 1942, the annual lay-up expenses averaged about $2,400 and the average annual cost of repairs was about $300.

14. On August 21, 1942, the day after the *Maitland No. 1* was requisitioned, a representative of the defendant made a condition survey of the vessel and itemized the repairs that were necessary to place her in operating condition. The surveyor's written report of such necessary repairs and the estimated cost thereof was as follows:

Item No.	Description	Cost
54a	Furnish and install 8 new furnaces (2 in each boiler) at $3,000 each	$24,000.00
b	Retube boilers. Cut out 1,124 defective tubes. Furnish and install new tubes. Cost per tube installed $7.50	8,430.00
c	Sealing boilers. After furnaces and tubes are removed, scale remainder of internal surfaces. $50 each	200.00
58	Renew defective bottom sections of front uptake breechings approximately 10' x 2'—12-gauge iron each boiler. $250 each	1,000.00
65	Repair or renew as required broken and defective sections of various sized pipe covering	500.00
66	Pumps—Dismantle feed pumps as required, remove outside plungers to shop true up and replace same	250.00
	Renew defective C. I. bends in ash ejector pipes, furnish necessary labor and material to effect this renewal	500.00
	Engine department total	34,880.00
91	Rebrick, clean out, free dampers, and doors as required	100.00
	Stewards department total	100.00
	Total for vessel	34,980.00

In addition to the work which the surveyor reported to be necessary, some additional minor repairs were needed. These included the installation of a new seagate at the stern, small repairs to the coal bunkers and one of the auxiliary engines, and the removal of the plank flooring laid on the car deck by the Nicholson Universal Steamship Company. The record does not show the total cost of these additional repairs but it would have been a relatively small amount.

15. Plaintiff depreciated the value of the *Maitland No. 1* on its books from October 1, 1916, to December 31, 1919, at the rate of one percent per annum and thereafter at the annual rate of four percent. On the date of the requisition, the book value of the vessel, as shown on plaintiff's records, was $75,509.51.

16 16. From January 1, 1938, to August 20, 1942, plaintiff maintained insurance on the *Maitland No. 1* based on a valuation of $100,000.

17. At the time she was requisitioned, the use to which the *Maitland No. 1* was best adapted was as a car ferry on the Great Lakes.

At that time, however, there was no demand for the vessel as a car ferry on Lake Erie and there is no satisfactory proof that there was any demand for her for use as a car ferry elsewhere on the Great Lakes.

Prior to 1936, the Pere Marquette Railway Company, which later became the Pere Marquette District of the Chesapeake and Ohio Railway Company, had a number of car ferries similar to the *Maitland No. 1*, operating on Lake Michigan and one in use on Lake Erie. Until about 1930, these car ferries held a competitive advantage over the all-rail transportation of loaded freight cars moving from western points to New York and Canada. Freight cars transported on the all-rail routes had to move through the Chicago yards where the congestion was so great that the freight cars were frequently delayed for long periods of time. In addition, freight rates on the car ferry lines were lower than on the all-rail routes. Sometime between 1928 and 1930, the railroads completed the construction of "an outer belt" railroad around the City of Chicago and this enabled them to avoid the long delays previously experienced in the Chicago yards. About the same time, the rate differential in favor of the car ferry lines was abolished. There were also changes in traffic on the ferry lines, which required more clearance between the car decks and the cabin decks of the vessels. As a result of these changed conditions, the ferry lines were no longer able to compete successfully with the all-rail routes and vessels of the *Maitland No. 1* type became obsolete for further use as car ferries on the Great Lakes. By 1936 the majority of these outmoded car ferries had been laid up and were replaced by larger vessels, having greater speed to permit faster and more regular operation and provided with more clearance between the decks so as to accommodate larger loads. The new vessels were capable of carrying a larger number of freight cars and had additional facilities for carrying passengers in order to provide a new source of revenue for the operators.

17 18. Although there was no demand in 1942 for the *Maitland No. 1* for use as a car ferry on the Great Lakes, there were a number of secondary uses for the vessel for which a demand did exist at that time.

In 1942, the *Maitland No. 1* could have been adapted for use as a highway ferry, for transporting automobiles and passengers on the Great Lakes or similar bodies of fresh water involving no greater length of haul. The vessel could have been converted for that purpose more economically and more quickly than for any other use, since the principal change that would have been required was the placing of an asphalt cover over the rails on the car deck to accommodate automobiles.

Between 1936 and 1940, several car ferries similar to the *Maitland No. 1* were sold to purchasers who converted them to highway ferries.

In 1938, the Pere Marquette Railway Company sold the car ferry, *Pere Marquette No. 20*, which had been built in 1903 from the same plans as the *Maitland No. 1*, to the Michigan Highway Department. The sale price was $50,000, plus an additional $10,000 for delivering the vessel across Lake Michigan to a shipyard.

In 1940 the Pere Marquette Railway Company sold the car ferry, *Pere Marquette No. 17*, which had been built in 1901 to the same plans as the *Maitland No. 1*, to the Michigan Highway Department for $65,000.

In 1936, the Ann Arbor Railroad sold the car ferry *Ann Arbor No. 4* to the Michigan Highway Department for $25,000. This vessel was smaller than the *Maitland No. 1*, being only 250 feet in length as compared with the 350-foot length of the *Maitland No. 1*.

19. Although the *Pere Marquette Nos. 17 and 20* were comparable to the *Maitland No. 1* in size, carrying capacity, speed and design, they were older vessels and on the dates they were sold, were in a much poorer state of repair than was the *Maitland No. 1* on the date of the requisition.

The *Pere Marquette No. 20* was laid up in September, 1930, and nothing was expended on her for maintenance or repairs between that time and the date of sale. In 1936, the owners made a survey of the vessel and estimated that it would cost $173,700 to
18 place her in operating condition for use as a car ferry for a period of five years. After it acquired the vessel, the Michigan Highway Department expended $215,000 for repairing and remodeling her for use as a highway ferry.

The *Pere Marquette No. 17* had likewise been laid up for a number of years prior to her sale. In 1936 the owners estimated that an expenditure of $147,200 would have been required to place the vessel in operating condition as a car ferry for a period of five years. A total of $534,000 was expended by the Michigan Highway Department for remodeling and reconditioning this vessel.

There is no proof with respect to the age or condition of the *Ann Arbor No. 4* at the time the vessel was sold in 1936.

20. In some instances, Great Lakes car ferries have been sold and converted to ocean-going car ferries, which operate between Texas City, Texas, and New York, between New Orleans and Havana, Cuba, and between Florida and Cuba. The cost of moving the Great Lakes vessels to the coast and altering them for use in salt water is substantial, and it has not been economically feasible to use them on the long routes from Texas to New York or between New Orleans and Cuba. For such long hauls, they cannot

compete successfully with the Sea Trains which can carry about four times as many freight cars.

However, such converted vessels have proven satisfactory for car ferry service between Florida and Cuba. In 1942, there was a demand for a vessel such as the *Maitland No. 1* for use as a car ferry between Florida and Cuba.

Shortly after the cessation of hostilities in World War II, the Grand Trunk Railway Company sold the *Grand Haven*, a car ferry formerly operated on the Great Lakes, to the West Indies Fruit and Steamship Company for $50,000. At considerable expense, the amount of which is not shown in the record, the vessel was floated down the Mississippi River and converted for use as a ferry between Florida and Cuba. The *Grand Haven* was built in 1903; she was a smaller vessel than the *Maitland No. 1* but had more speed and power. There is no evidence regarding the condition of this vessel at the time of sale.

In May 1941, the Florida East Coast Railroad Company sold the *Henry M. Flagler*, a car ferry which had operated between
19 Florida and Cuba, to Hans Isbrantsen of New York for $100,000. The purchaser owned a line of freighters but was not a car ferry operator. Apparently, he bought the vessel as an investment.

The *Flagler* was built in 1914 from substantially the same plans as the *Maitland No. 1*. The principal difference between the vessels was that the *Flagler* was equipped to operate in and had been used in salt water. As in the case of the *Maitland No. 1*, the *Flagler* had had been laid up for ten years prior to the sale. Between 1936 and 1941, the total expended for repairs or maintenance on this vessel was only $15,679, but between May 1941 and July 28, 1941, the purchaser, Mr. Isbrantsen, expended the sum of $63,820 for necessary repairs on the *Flagler*. On July 28, 1941, the War Shipping Administration requisitioned this vessel and appraised her value at $170,000, which the owner accepted as compensation for the taking.

In June 1942, the War Shipping Administration requisitioned two ocean-going car ferries which were owned by the Florida East Coast Railroad Company and had been operated by that company between Florida and Cuba. These vessels were the *Joseph R. Parrott* and the *Estrada Palma*. By negotiation between the parties, a value of $665,000 for both vessels, of $332,500 for each, was agreed upon, and the Florida East Coast Railroad Company accepted that sum in full payment of the vessels. Except for the fact that these car ferries were equipped to operate in salt water, whereas the *Maitland No. 1* was not, the *Joseph R. Parrott* and the *Estrada Palma* were comparable in age, size dimensions, engines, power, boilers, auxiliaries, and type of construction to the *Maitland No. 1*. The *Joseph*

R. Parrott was built in 1916 and the *Estrada Palma* in 1920; both vessels were in service at the time they were requisitioned. Between 1936 and 1941, the owners expended $128,144 for maintenance and repairs to the *Joseph R. Parrott*, but the record does not reflect the amount spent on the *Estrada Palma* for repairs during that period of time. The Government had condition surveys made of both vessels, and the surveyors found that the estimated amounts required to repair them on or about the date they were requisitioned was $23,595 for the *Joseph R. Parrott* and $19,430 for the *Estrada Palma*.

20 The normal useful life of a car ferry operated on the Great Lakes is fifty years, whereas such a car ferry operated in salt water has a normal useful life of only forty years.

On the Atlantic Coast, the market price of vessels increased between 1941 and 1942 because of the greater demand for vessels which occurred after the beginning of World War II. The estimated amount of this increase that would have been applicable had the *Maitland No. 1* been sold in 1942 for the purpose described above, is the sum of $11,420.

At the time of the requisition, it would have cost not less than $115,000 to move the *Maitland No. 1* to the Atlantic Coast and fit her for operation in salt water. In addition, some strengthening of the framing would probably have been required before the vessel could be classified for ocean-going service. There is no evidence as to how much these additional changes would have cost.

21. In 1940 and 1942, two vessels which had become obsolete for further use as car ferries, were sold to purchasers, who removed the engines from the boilers, tore off the superstructure of the vessels and used them as bulk carriers of pulpwood.

In July, 1940, the Pere Marquette Railway Company sold the *Pere Marquette No. 19* to John Roen of Sturgeon Bay, Wisconsin, for $24,000. The vessel was built to the same plans as the *Maitland No. 1* and was a sister ship of the *Pere Marquette No. 20*, which was referred to in finding 18. She had been laid up for a number of years, and just prior to the sale, the owners estimated that an expenditure of $308,000 would be required to recondition her for an additional fifteen or twenty years' operations.

In March 1942, the *Marquette and Bessemer No. 2* was sold to the Filer Fiber Company for $37,724.04. The vessel, which had been built in 1910 from the same plans as the *Maitland No. 1*, was jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Railway Company and had formerly been used as a car ferry on Lake Erie. She had been retired from service as a car ferry in 1931 and received no maintenance or repairs thereafter. In 1936 the vessel was towed to Cleveland, where she was used during 1936 and 1937 as a cabaret in connection

with the Cleveland Exposition. The operators of the night
21 club removed her bulwark plates, tore out the cabins and stripped her of most of her readily removable parts and equipment. Prior to the sale, the owners estimated that by expending $300,000 for repairs, the vessel could be placed in condition to operate for fifteen or twenty additional years.

After the expiration of its useful life, or after it has become obsolete, a car ferry has a residual value for scrap steel. The scrap value of the *Maitland No. 1* in August 1942 was $13,500.

22. The fair value of the *Maitland No. 1* at the time of the requisition was $161,833.72.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover $107,458.72 with interest.

It is therefore ordered and adjudged that plaintiff recover of and from the United States the sum of one hundred seven thousand four hundred fifty-eight dollars and seventy-two cents ($107,458.72), with interest thereon at the rate of 4 percent per annum from June 10, 1944, to date of payment. To this sum should be added compensation measured by interest at 4 percent per annum for delay in payment on $161,833.72 from August 20, 1942, to June 10, 1944.

OPINION

HOWELL, *Judge*, delivered the opinion of the Court:

This is an action to recover just compensation, pursuant to the Fifth Amendment to the Constitution, for the Great Lakes car ferry *Maitland No. 1*, requisitioned by the War Shipping Administration of the United States on August 20, 1942.

The only question presented in this case relates to the value of the *Maitland No. 1*. Plaintiff contends that its value is somewhere between a minimum of $332,500 and a maximum of $458,689.89, while it is the defendant's position that the value does not exceed $72,500. The Commissioner of the Court reported a value of $182,-
900. The difference between the various figures results en-
22 tirely from differences in the elements considered in computing the value of the vessel and the weight to be given to those various elements.

This vessel was requisitioned pursuant to Section 902 of the Merchant Marine Act of 1936, as amended. Subdivisions (a) and (d) of this section, which are the only ones here pertinent, read as follows:

> (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President,

it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

* * * * *

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U. S. C. 1934 edition, title 28, secs. 41, 250).

23 The *Maitland No. 1* was designed and built by the Great Lakes Engineering Works in 1916. It was a conventional, steel hull, two masted, two stacker, twin screw, car ferry with extra weight of steel to make it suitable for winter ice-breaking operation. The vessel was 350 feet in length, 56 feet beam, 20 feet 6 inches molded depth to the car deck, with a clearance between the car and the spar decks of 17 feet 7 inches. Its gross tonnage was 2,757 tons and it was powered by two triple expansion reciprocating engines driven by four Scotch boilers, fired by coal under a forced draft to operate at a maximum pressure of 175 pounds. The hold was divided into eight compartments housing the engines, boilers, steering engine, coal bunkers, ballast and shaft alley. The coal bunkers had a capacity of 332 net tons. Four railroad tracks were installed on the car

deck and they had a capacity of 30 box cars of the short conventiona size weighing loaded, 70 tons, or 26 cars of the larger, modern type.

The *Maitland No. 1* was constructed for Mr. L. N. Beckley, who was the president of plaintiff. The approximate cost of constructing the vessel was $362,800. In August 1916 the plaintiff acquired the *Maitland No. 1* from Mr. Beckley at a cost of $394,560, a mark-up of about 8.75 percent over cost of construction.

From 1917 to 1930 plaintiff expended $38,115.46 for equipment and betterments to the vessel.

From October 1916 to June 1932, plaintiff operated the *Maitland No. 1* on Lake Erie, between the ports of Ashtabula, Ohio, and Port Maitland, Canada, a distance of 91 miles. The vessel was capable of making three round trips every two days, and carried commodities loaded in freight cars moving between points in the Pittsburgh area, served by the New York Central Railroad, and points in Canada, served by the Toronto, Hamilton and Buffalo Railway Company. From the date of its organization to about February 10, 1936, all of plaintiff's capital stock was owned by the latter company, a subsidiary of the New York Central Railroad. On or about the latter date, the Toronto, Hamilton and Buffalo Railway Company distributed plaintiff's stock to its stockholders, the New York Central and the Canadian Pacific.

The *Maitland No. 1* was the only vessel owned and operated by plaintiff on its car ferry line. Plaintiff's chief source of revenue was derived from the transportation of bituminous coal to Canada, and its annual income over the sixteen and one-half year period of operation fluctuated with the tonnage of coal carried by the car ferry. For the first four and one-half years (August 12, 1916, to January 1, 1921), the average annual net operating income from the *Maitland No. 1* was $17,216.28. In 1921 and 1922 the car ferry was operated at a net loss, the average loss for the two years being $14,461.90. During the next five years (1923 to 1927, inclusive), the net operating income from the *Maitland No. 1* was at its highest level during the entire period the car ferry was in use, averaging $129,893.92 per annum. Beginning in 1928, the net operating income declined sharply below the 1927 earnings. This downward trend continued in 1929, the average net income for the two years being $22,950.42. The vessel was operated at a net loss in 1930, 1931 and the first six months of 1932, the average annual loss being $15,417.82. For the entire period from August 12, 1916, to June 30, 1932, plaintiff's annual average net income from the *Maitland No. 1*, before Federal income taxes, was $42,816.36. This amounted to 10.41 percent of plaintiff's investment.

24

The sharp decline in plaintiff's net operating income in 1928 and 1929 was contrary to the trend of earnings of Class I railroads in this country during the same period. In 1928 and 1929 the freight

revenues of Class I railroads of the United States were in excess of their 1927 revenues. Also, the exports of bituminous coal from the Ohio Customs District to Canada were greater in 1928 and 1929 than in 1927.

The reasons for this reduction in revenue, which began in 1928 and ultimately resulted in the discontinuance of operation in 1932, were set out in an application which plaintiff filed with the Interstate Commerce Commission on February 11, 1943, for leave to abandon its car ferry line. This application was filed after the defendant had requisitioned the *Maitland No. 1*, and the first reason stated for abandonment was that the only vessel owned by plaintiff had been requisitioned by the War Shipping Administration. The second ground for abandonment, as stated by plaintiff in this petition, was:

> 25 Since June 1932, when the vessel operation ceased there has been insufficient traffic available to justify the operation. Cross-lake traffic to Canadian rail heads dropped off upon the opening of the new Welland Canal in 1932 because larger vessels could take cargoes directly from Lake Erie to Lake Ontario ports. Traffic handled over the route moves on a slower schedule than if handled all-rail through Buffalo, New York. Identical rates are applicable over the two routes.

In its Reply to Questionnaire filed with the Interstate Commerce Commission in the same proceeding, plaintiff expanded on this matter, stating:

> 15A. The traffic over the line decreased to such an extent that service was suspended on June 28, 1932. Prior to 1928 the bulk of the traffic handled consisted of bituminous coal for movement to the Steel Company of Canada at Hamilton, Ontario. In August 1928, this traffic was diverted to Sodus Point, New York, for movement across Lake Ontario to Hamilton. When the new Welland Canal was opened in August 1932, most of the remaining traffic was lost since vessels formerly unable to navigate the old Canal were enabled to take shipments directly to Lake Ontario points, by-passing Port Maitland without using the facilities of the applicant or its connecting rail line in Canada.
>
> * * * * *
>
> 17A. No effort has been made to dispose of the line so as to insure continued operation since traffic is not available in sufficient quantities to warrant continued operation, even if a suitable car ferry were available. The all-rail routes are adequate and convenient.

As noted above, the *Maitland No. 1* was laid up at her dock at Ashtabula, Ohio, on June 30, 1932. After that date it was never operated by plaintiff, and was never operated as a car ferry. On November 29, 1935, plaintiff did charter the *Maitland No. 1* to Nicholson Universal Steamship Company, which covered the tracks on the car deck with planking and used the vessel to carry freight across Lake Michigan, between Milwaukee, Wisconsin, and Muskegon, Michigan. However, it was discovered that this operation was in violation of Section 27 of the Merchant Marine Act of 1920 (46 U. S. C. 883), which prohibits the transportation of merchandise by water between two ports of the United States in vessels owned by persons who are not citizens of the United States. To
26 avoid the effect of this statute, plaintiff made an agreement with Nicholson Universal Steamship Company whereby title to the *Maitland No. 1* was transferred to Nicholson on February 10, 1936, for a total consideration of $166,000. In the contract of sale plaintiff retained the right to recapture the vessel within a specified time, and exercised this right on December 15, 1937, reacquiring title for $92,894.80.

During the succeeding period, the vessel was moored at her dock in Ashtabula, Ohio, with either the Chief Engineer or Captain on board as shipkeeper, during which time steam was maintained in the boilers, the engines were turned over periodically, maintainence work was performed, and extra help was employed when necessary. Some minor repair work was done at an average annual expenditure during the period from January 1, 1938, to August 20, 1942, of about $300.

On August 20, 1942, the War Shipping Administration requisitioned title to and possession of the *Maitland No. 1*. On the following day a representative of War Shipping Administration made a condition survey of the vessel and itemized the repairs that were necessary to place her in operating condition. He estimated a total expenditure of $34,980, involving principally the replacement of the furnaces which heated the boilers and the retubing of the boilers. In addition to the items listed by him, the vessel required some additional minor repairs.

Shortly after the requisition the War Shipping Administration removed the machinery from the vessel and sold the hull to a purchaser who converted it into a barge.

On April 20, 1943, the War Shipping Administration fixed the sum of $72,500 as just compensation for, and the fair value of, the *Maitland No. 1*. Plaintiff was given prompt notice of this determination. On December 21, 1943, plaintiff notified the defendant that the amount fixed by it as just compensation was unsatisfactory to plaintiff, and that it elected to exercise its statutory right to receive 75 percent of the award without prejudice to its right to sue for

additional compensation. On June 10, 1944, defendant paid plaintiff the sum of $54,375, being 75 percent of the War Shipping Administration's determination of just compensation.

27 In considering the question of the value of the *Maitland No. 1*, it is first essential to understand the background against which such value must be determined. The first point to consider in this connection is that, although the use to which the *Maitland No. 1*, was best adapted at the time of the requisition was as a car ferry on the Great Lakes, there was no demand for her for such use. The reason for this lack of demand requires a brief consideration of the entire history of car ferry operation on the Great Lakes.

Most operation of car ferries on the Great Lakes has centered on Lake Michigan and the Detroit River. The only car ferries which have ever operated elsewhere on the Great Lakes, so far as the present record discloses, are the *Maitland No. 1*, the *Ashtabula*, owned by the Pennsylvania Railroad, and the *Marquette and Bessemer No. 2*, jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Railway Company, all three of which operated across Lake Erie from Ohio to Canada. As noted above, lack of traffic and its diversion to other routes had caused plaintiff to take the *Maitland No. 1* out of service in the middle of 1932. The Pennsylvania Railroad continued the operation of its car ferry, since it did not control a rail route into Canada, as did the New York Central. Neither in 1942 nor at any time subsequent thereto has the Pennsylvania Railroad required an additional car ferry to handle its traffic. The *Marquette and Bessemer No. 2*, referred to above, had been laid up in 1931, was not operated thereafter, and was sold in March 1942 for $37,724.04.

With the exception of car ferries operated across the Detroit River, where an entirely different type of boat was used under different traffic conditions, the balance of the car ferries on the Great Lakes operated across Lake Michigan chiefly between points in Michigan and in Wisconsin. Until about 1930 these car ferries held a competitive advantage over the all-rail transportation of loaded freight cars moving from western points to New York and Canada. Freight cars transported on the all-rail routes had to move through the Chicago yards, where the congestion was so great that freight cars were frequently delayed for long periods of time. In addition, freight rates on the car ferry lines were lower than on the all-rail routes.

28 Sometime between 1928 and 1930 the railroads completed the construction of the "outer belt" railroad around the city of Chicago, and thus enabled through freight shipments to avoid the delays previously experienced in the Chicago yards. About the same time the rate differential in favor of the car ferry lines was abolished. There were also changes in the nature of the

traffic carried by the car ferry lines, which required greater clearanc between the car decks and the cabin decks of the vessels to permi open-type freight cars to be loaded with maximum loads.

As a result of these changed conditions, the car ferry lines wer no longer able to compete successfully with the all-rail routes, at leas so long as they were operating vessels of the type of the *Maitland No. 1*. For that reason, this type of vessel became obsolete for fur- ther use as car ferries on the Great Lakes. By 1932 the majority o these outmoded car ferries had been laid up and were replaced by larger vessels, having greater speed to permit faster and more regula operation (including operation on a twelve months' basis, as con- trasted with the winter layup which the *Maitland No. 1* had always had), and provided with more clearance between the decks so as to accommodate larger loads. The new vessels were also capable of carrying a larger number of freight cars, and had additional facili- ties for carrying passengers (and, if space were available, their auto- mobiles), in order to provide a new source of revenue for the opera- tors.

Between 1936 and 1940, several car ferries resembling the *Mait- land No. 1* were sold to purchasers who converted them to highway ferries.

In 1938, the Pere Marquette Railway Company sold the car ferry, *Pere Marquette No. 20*, which had been built in 1903 from the same plans as the *Maitland No. 1*, to the Michigan Highway Department. The sale price was $50,000, plus an additional $10,000 for delivering the vessel across Lake Michigan to a shipyard.

In 1940 the Pere Marquette Railway Company sold the car ferry, *Pere Marquette No. 17*, which had been built in 1901 to the same plans as the *Maitland No. 1*, to the Michigan Highway De- partment for $65,000.

Although the *Pere Marquette Nos. 17 and 20* were comparable to the *Maitland No. 1* in size, carrying capacity, speed and
29 design, they were older vessels and on the dates they were sold, were in a much poorer state of repair than was the *Maitland No. 1* on the date of the requisition.

In some instances, Great Lakes car ferries have been sold and con- verted to ocean-going car ferries, which operate between Texas City, Texas, and New York, between New Orleans and Havana, Cuba, and between Florida and Cuba. The cost of moving the Great Lakes vessels to the coast and altering them for use in salt water is substantial and it has not been economically feasible to use them on the long routes from Texas to New York, or between New Orleans and Cuba. For such long hauls, they cannot compete suc- cessfully with the Sea Trains which can carry about four times as many freight cars.

However, such converted vessels have proven satisfactory for car ferry service between Florida and Cuba. In 1942, there was a de-

mand for a vessel such at the *Maitland No. 1* for use as a car ferry between Florida and Cuba.

The United States in June 1942 had appropriated two ferries from the Florida East Coast Car Ferry Company, one, the *Joseph R. Parrott*, and the other, the *Estrada Palma*, for which the parties by open negotiation and agreement, without litigation, fixed a value of $665,000.00 for both, or $332,500.00 for each.

An analysis provides a startling comparison of the equality of the vessels in type, construction, machinery and condition.

Vessel	*Joseph R. Parrott*	*Estrada Palma*	*Maitland No. 1*
Date of survey	5/31/1942	6/19-21/1942	8/21/1942.
Year built	1916	1920	1916.
Gross tons	2,406	2,639	2,757.
Net tons	1,114	1,340	1,653.
Propelling machinery.	Twin screw triple expansion.	Twin screw triple expansion.	Twin screw triple expansion.
Boilers	4 Scotch forced draft.	4 Scotch forced draft.	4 Scotch forced draft.
Sale price	$332,500.00	$332,500.00	?
Cost to place in operating condition.	$23,595.00	$19,430.00	$34,980.00.
Sound condition value	$356,095.00	$351,930.00	?.

The acquisition of the *Joseph R. Parrott* and the *Estrada Palma* provide contemporaneous transactions in vessels of great similarity to the *Maitland*. As a means of establishing value by the market value method, the values fixed for the *Joseph R. Parrott* and
30 the *Estrada Palma* should furnish close equivalents.

The principal difference between the vessels was that the latter two were equipped to operate in and had been used in salt water, whereas the evidence shows that in August 1942 it would have cost approximately $115,000 to move the *Maitland No. 1* to the Atlantic Coast and fit her for operation in salt water.

The normal useful life of a car ferry operated on the Great Lakes is fifty years, whereas such a car ferry operated in salt water has a normal useful life of only forty years.

Even after the normal life for its primary use as a car ferry has ended, such a vessel has a residual value for a secondary use, such as a highway ferry, bulk carrier, a marine auxiliary for a wrecker, a marine dormitory, a bulkhead, a night club, or as scrap steel.

In 1940 and 1942, two vessels which had become obsolete for further use as car ferries were sold to purchasers, who removed the engines from the boilers, tore off the superstructure of the vessels and used them as bulk carriers of pulpwood.

In July 1940, the Pere Marquette Railway Company sold the *Pere Marquette No. 19* to John Roen of Sturgeon Bay, Wisconsin, for $24,000. The vessel was built to the same plans as the *Maitland No. 1* and was a sister ship of the *Pere Marquette No. 20* which was referred to above. She had been laid up for a number of years, and just prior to the sale, the owners estimated that an expenditure of

$308,000 would be required to recondition her for an additional fifteen or twenty years' operations.

In March 1942, the *Marquette and Bessemer No. 2* was sold to the Filer Fiber Company for $37,724.04. The vessel, which had been built in 1910 from the same plans as the *Maitland No. 1*, was jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Railway Company and had formerly been used as a car ferry on Lake Erie. She had been retired from service as a car ferry in 1931 and received no maintenance or repairs thereafter. In 1936 the vessel was towed to Cleveland,
where she was used during 1936 and 1937 as a cabaret in
31 connection with the Cleveland Exposition. The operators of the night club removed her bulwark plates, tore out the cabins and stripped her of most of her readily removable parts and equipment. Prior to the sale, the owners estimated that by expending $300,000 for repairs, the vessel could be placed in condition to operate for fifteen or twenty additional years.

The general rule is that market value at the time and place of taking is just compensation for condemned property (*United States* v. *New River Collieries*, 262 U. S. 341, 344; *United States* v. *Miller*, 317 U. S. 369, 374; *United States* v. *Powelson*, 319 U. S. 266, 275). Every isolated sale of property, however, does not thereby create or establish a market in such property for the purpose of ascertaining market value. If the property taken "be an article commonly traded in on a market and it is shown that at the time and place it was taken there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition" (*United States* v. *New River Collieries, supra*, p. 345). "So evidence of prices current among dealers in commodities which are the subject of frequent sales would be proper to show value" (*Sharp* v. *United States*, 191 U. S. 341, 349-350). The transactions relied upon, however, to establish a market value should be numerous and the quantities sold should be extensive in order that a proper criteria of market price be obtained (*United States* v. *New River Collieries, supra*, p. 345).

Where, as in this case, the property condemned is unique, or of a special type or character, or so peculiarly situated, that there is no evidence of proper sales by which to establish value, or, where there may be evidence of dealings in similar property, but the transactions have been few and infrequent, or they may have been of such a character, or so remote in time, that they do not meet the test of numerous sales in significant quantities as required by law, then resort must be had to other methods and other evidence to establish the value of the property taken (*United States* v. *Miller, supra*, 374; *Washington Water Power Co.* v. *United States*, 135 F. (2d) 541, 542).

32 Sometimes "the value of property generally speaking is determined by its productiveness—the profits which its use brings to the owner. Various elements enter into this matter of value. * * * value, therefore, is not determined by the mere cost of construction, but more by what a completed structure brings in the way of earnings to its owner" (*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 328). "Among the factors to be taken into consideration is such an amount as when capitalized at a certain percentage will produce yearly the revenue which plaintiff has lost * * *" (*Willow River Power Co., Inc.* v. *United States*, 101 C. Cls. 222, 230).

In this case there are several unusual factors which render it difficult to apply the ordinary methods in determining a fair compensatory value at the time of the taking of the *Maitland No. 1*. We have found that the vessel was best adapted at the time of requisition as a car ferry on the Great Lakes, though there was no demand for her for such use. Furthermore, we have before us the fact that the *Maitland No. 1* was laid up at her dock on June 30, 1932. Later the vessel was used for a short time to carry freight across Lake Michigan, which can be termed as a profitable use which might have been continued had this operation not been in violation of the Merchant Marine Act of 1920, *supra*. Obviously, the vessel had a value in excess of the residual value of an obsolete car ferry even though it was not in actual operation in 1942.

In view of all these circumstances, we are compelled to resort to a consideration of the earnings of the *Maitland No. 1* during the time that the vessel was actually operated as a car ferry, in conjunction with the contemporaneous transactions in vessels of close similarity in determining a fair value.

The proof in this case shows that the average annual net profit for the 16-year period that the vessel was operated, before income taxes, amounted to $42,816.36, a return on investment of 10.41 percent per annum.

The testimony further disclosed that the *Maitland No. 1* had a residual value solely as scrap in 1942 of approximately $13,500,
33 and that at the time of the trial such scrap value varied between $64,000 and $100,100. The sale prices of the several obsolete car ferries represent their residual values for secondary uses and those prices ranged between a low of $24,000 paid for the *Pere Marquette No. 19*, to a high of $65,000 paid for the *Pere Marquette No. 17*.

The average mean residual value of an obsolete car ferry can be taken at $50,000. Attributing this value to the *Maitland No. 1*, the capitalized value of an annual income of $42,816.36 for a period of 24 years at an annual rate of 10 percent per annum amounts to $389,767.15, according to actuarial tables in evidence.

This figure approximates the amount paid by defendant to Florida East Coast Car Ferry Company for the car ferries *Joseph R. Parrott* and *Estrada Palma*, both of which vessels had been operating along the Atlantic Coast and consequently were equipped to operate in salt water. The *Maitland No. 1*, however, was not equipped to operate in nor had it been used in salt water. As a matter of fact, it had been operated only in fresh water involving no great length of haul. The evidence discloses that the normal useful life of a car ferry operated in salt water in only 80 percent of such a ferry operated in fresh water, the comparison being 40 and 50 years respectively. The remaining useful life of the *Maitland No. 1* operated in salt water would be reduced by 20 percent, which in turn would be reflected in its value at the time of taking. Consequently, from the value of $389,767.15 there must be deducted $77,953.43.

A survey of the *Maitland No. 1* made at the time of its requisition, which defendant stipulated reflected its true condition, indicated that an expenditure of $34,980 would place the vessel in sound operable condition. From the sum of $311,813.72 this figure must be deducted.

As pointed out above, in August 1942 it would have cost approximately $115,000 to move the *Maitland No. 1* to the Atlantic Coast and fit her for operation in salt water. Therefore, from the sum of $276,833.72 there must be deducted the amount of $115,000.

With these considerations in mind, we therefore find that the fair value of the *Maitland No. 1* for its highest available and most profitable use for which it was adaptable at the time of its taking
34 is $161,833.72. (*Olson* v. *United States*, 292 U. S. 246, 255; *Cameron Development Co.* v. *United States*, 145 F. (2d) 209, 210; *Washington Water Power Co.* v. *United States*, *supra*, 543.)

Against this amount the defendant is entitled to credit for the sum of $54,375 paid on June 10, 1944.

Plaintiff is also entitled to recover compensation measured by interest at 4 percent per annum for delay in payment on $161,833.72 from August 20, 1942, to June 10, 1944, and on $107,458.72 from June 10, 1944, to date of payment.

It is so ordered.

LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

WHITAKER, *Judge*, dissenting:

I am unable to agree with the judgment of the court.

The amount is arrived at by taking the average earnings of the vessel from 1916 to 1932 and capitalising them at 10 percent, and then deducting therefrom the difference in its remaining useful life when used in salt water and in fresh water, and also the cost of reconditioning it, and the cost of transporting it to the Florida east coast. This is an improper basis, I think, because at the time of its requisition it was earning nothing and had earned nothing for quite a long time. Had it been requisitioned during its earning period

its earnings would have been a proper matter to take into consideration, but I do not think this is proper where it was requisitioned long after its earning power had ceased.

Nor do I think the price at which comparable vessels sold on the Florida east coast is a proper basis for determining just compensation, because it presupposes that the owner of this vessel on the Great Lakes would have been able to sell his vessel after he had transported it down there, and there is no showing whatever it would have been able to do so. I feel quite sure that plaintiff would not have gone to the expense of $115,000 to transport the vessel to the Florida east coast in the hope of finding a purchaser there. Just compensation is to be determined not only as of the time of the taking but also as of the place of taking. *United States* v. *New River Collieries*, 262 U. S. 341; *United States* v. *Miller*, 317 U. S. 369; *United States* v. *Powelson*, 319 U. S. 266, cited in majority opinion.

35-36 The majority opinion shows that the sale price on the Great Lakes of similar vessels, which had likewise become obsolete for the use for which they had been originally constructed, ranged from $24,000 to $65,000. The War Shipping Administration fixed $72,500 as just compensation. I do not think the plaintiff has carried the burden of showing that this was incorrect. If plaintiff had undertaken to dispose of its vessel on the Great Lakes it seems improbable that it could have secured any greater sum.

Judge MADDEN concurs in the foregoing opinion.

NOTE RE EXHIBITS

Defendant's Exhibit No. 13, made a part of the findings herein by reference, accompanies this record under separate cover.

37-38 JUDGEMENT OF THE COURT—December 6, 1948

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

IT IS THEREFORE ORDERED AND ADJUDGED that plaintiff recover of and from the United States the sum of one hundred seven thousand four hundred fifty-eight dollars and seventy-two cents ($107,458.72), with interest thereon at the rate of 4 percent per annum from June 10, 1944, to date of payment. To this sum should be added compensation measured by interest at 4 percent per annum for delay in payment on $161,833.72 from August 20, 1942, to June 10, 1944.

39 Clerk's Certificate to foregoing transcript omitted in printing.

40 DEFENDANT'S EXHIBIT No. 13

Averages computed for
Period 8/12/1916 to 12/31/1920=4.389 years.
Period 1923 to 1927, incl.=5 years.

From (*Deft's Ex. 13*)

			Annual average
(a) *Net operating Income:*			
8/12/1916 to Dec. 31, 1920	= $ 75,562.24	=	$ 17,216.28
	4.389 yrs.		
Jan. 1, 1923 to Dec. 31, 1927	= $649,469.59	=	$129,893.92
	5 years		
(b) *Net Income:*			
Aug. 12, 1916—Dec. 31, 1920	= $ 73,234.09	=	$ 16,685.83
	4.389 yrs.		
Jan. 1, 1923 to Dec. 31, 1927	= $696,383.81	=	$139,276.76
	5 years		

Period	Revenue	
	Charter Revenue	Freight Revenue
8/12/16–12/31/16	$10,505.16	$25,283.06
1917		149,641.87
1918		164,116.40
1919		164,830.82
1920		217,286.29
1921		164,277.00
1922		133,342.26
1923		347,620.33
1924		254,276.00
1925		282,923.78
1926		307,639.19
1927		332,328.28
1928		205,517.96
1929		201,442.78
1930		164,856.79
1931		127,951.24
1/1/32–6/30/32		28,547.37
Total	$10,505.16	$3,271,881.42
7/1/32–12/31/32		
1933		
1934		
1935	3,506.13	
1936	2,900.00	
1937		
1938		
1939		
1940		
1941		
1942		
Total	$16,911.29	$3,271,881.42

DEFENDANTS EXHIBIT 13

Toronto, Hamilton, & Buffalo Navigation Company

Summary, Annual Profit & Loss Statements 1916 through 1942

(Exclusive of Federal Income Taxes as an Expense Item)

Period	Revenue			Expenses			Net Operating Revenue	Taxes other tha on Inco
	Charter Revenue	Freight Revenue	Total	Operating Expenses	Depreciation	Total		
8/12/16–12/31/16	$10,505.16	$25,283.06	$35,788.22	$28,166.04	$986.91	$29,152.95	$6,635.27	$—0—
1917		149,641.87	149,641.87	132,350.50	3,947.64	136,298.14	13,343.73	1,253.
1918		164,116.40	164,116.40	138,448.96	3,947.64	142,396.60	21,719.80	1,686.
1919		164,830.82	164,830.82	150,025.02	3,947.64	153,972.66	10,858.16	1,764.
1920		217,286.29	217,286.29	171,235.06	15,929.68	187,164.74	30,121.55	2,412.
1921		164,277.00	164,277.00	161,780.86	15,929.64	177,710.50	(13,433.50)	2,292.
1922		133,342.26	133,342.26	132,662.20	16,170.36	148,832.56	(15,490.30)	2,313.
1923		347,620.33	347,620.33	151,974.12	16,170.36	168,144.48	179,475.85	2,523.
1924		254,276.00	254,276.00	152,641.15	16,170.36	168,811.51	85,464.49	2,475.
1925		282,923.78	282,923.78	147,776.59	16,170.36	163,946.95	118,976.83	1,946.
1926		307,639.19	307,639.19	155,724.85	16,298.34	172,023.19	135,616.00	2,662.
1927		332,328.28	332,328.28	169,716.03	16,426.32	186,142.35	146,185.93	6,641.
1928		205,517.96	205,517.96	163,315.70	17,115.76	180,431.46	25,086.50	6,641.
1929		201,442.78	201,442.78	163,370.44	17,257.99	180,628.43	20,814.35	5,696.
1930		164,856.79	164,856.79	148,379.36	17,311.32	165,690.68	(833.89)	4,559.
1931		127,951.24	127,951.24	125,132.65	17,337.96	142,470.61	(14,519.37)	1,502.
1/1/32–6/30/32		28,547.37	28,547.37	43,069.69	8,668.98	51,738.67	(23,191.30)	750.
Total	$10,505.16	$3,271,881.42	$3,282,386.58	$2,335,769.22	$219,787.26	$2,555,556.48	$726,830.10	$47,120.
7/1/32–12/31/32								
1933								
1934								
1935	3,506.13		3,506.13	753.88	1,444.83	2,198.71	1,307.42	95
1936	2,900.00		2,900.00	8,103.90	932.15	9,036.05	(6,136.05)	—0—
1937								
1938								
1939								
1940								
1941								
1942								
Total	$16,911.29	$3,271,881.42	$3,288,792.71	$2,344,627.00	$222,164.24	$2,566,791.24	$722,001.47	$47,21

Schedule

( ) denotes red figures.

DEFENDANTS EXHIBIT 13

Toronto, Hamilton, & Buffalo Navigation Company

Summary, Annual Profit & Loss Statements 1916 through 1942

(Exclusive of Federal Income Taxes as an Expense Item)

Total	Expenses			Net Operating Revenue	Taxes other than on Income	Net Operating Income	Other Income	Other Expenses	Net Income
	Operating Expenses	Depreciation	Total						
5,788.22	$28,166.04	$986.91	$29,152.95	$6,635.27	$—0—	$6,635.27		$301.64	$6,333.63
9,641.87	132,350.50	3,947.64	136,298.14	13,343.73	1,253.40	12,090.33		1,252.64	10,837.69
4,116.40	138,448.96	3,947.64	142,396.60	21,719.80	1,686.11	20,033.69		450.00	19,583.69
4,830.82	150,025.02	3,947.64	153,972.66	10,858.16	1,764.54	9,093.62		313.87	8,779.75
7,286.29	171,235.06	15,929.66	187,164.74	30,121.55	2,412.22	27,709.33		10.00	27,699.33
4,277.00	161,780.86	15,929.64	177,710.50	(13,433.50)	2,292.16	(15,725.66)	$740.60	2,110.68	(17,095.74)
3,342.26	132,662.20	16,170.36	148,832.56	(15,490.30)	2,313.06	(17,803.36)	100.66		(17,702.70)
7,620.33	151,974.12	16,170.36	168,144.48	179,475.85	2,523.64	176,952.21	373.84		177,326.05
4,276.00	152,641.15	16,170.36	168,811.51	85,464.49	2,475.70	82,988.79	1,714.06		84,702.85
3,923.78	147,776.59	16,170.36	163,946.95	118,976.83	1,946.30	117,030.53	13,594.13		130,624.66
7,639.19	155,724.85	16,298.34	172,023.19	135,616.00	2,662.17	132,953.83	15,080.82		148,034.65
4,328.28	169,716.03	16,426.32	186,142.35	146,185.93	6,641.70	139,544.23	16,151.37		155,695.60
5,517.96	163,315.70	17,115.76	180,431.46	25,086.50	6,641.70	18,444.80	16,146.70		34,591.50
1,442.78	163,370.44	17,257.99	180,628.43	20,814.35	5,696.26	15,118.09	18,396.50		33,514.59
4,856.79	148,379.36	17,311.32	165,690.68	(833.89)	4,559.00	(5,392.89)	17,429.34		12,036.45
7,951.24	125,132.65	17,337.96	142,470.61	(14,519.37)	1,502.08	(16,021.45)	7,222.95		(8,798.50)
4,547.37	43,069.69	8,668.98	51,738.67	(23,191.30)	750.00	(23,941.30)	1,648.64		(22,292.66)
1,386.58	$2,335,769.22	$219,787.26	$2,555,556.48	$726,830.10	$47,120.04	$679,710.06	$108,599.61	$4,438.83	$783,870.84
						—0—	5,745.86	16,408.17	(10,662.31)
						—0—	9,762.25	24,035.25	(14,273.00)
						—0—	10,144.97	24,564.12	(14,419.15)
1,506.13	753.88	1,444.83	2,198.71	1,307.42	95.00	1,212.42	5,984.05	17,662.67	(10,466.20)
1,900.00	8,103.90	932.15	9,036.05	(6,131.05)	—0—	(6,136.05)	20,279.22	8,754.80	5,388.37
						—0—	4,813.31	2,364.96	2,448.35
						—0—	693.05	8,907.61	(8,214.56)
						—0—	1,248.00	8,696.72	(7,448.72)
						—0—	1,275.97	8,392.35	(7,116.38)
						—0—	1,436.50	7,984.96	(6,548.46)
						—0—	1,514.88	8,881.10	(7,366.22)
1,792.71	$2,344,627.00	$222,164.24	$2,566,791.24	$722,001.47	$47,215.04	$674,786.43	$171,497.67	$141,091.54	$705,192.56

( ) denotes red figures.

Schedule VI

☆ U. S. GOVERNMENT PRINTING OFFICE: 1939 619983 488

Supreme Court of the United States

Order allowing certiorari

Filed May 2, 1949

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ. The case in transferred to the summary docket.

U. S. GOVERNMENT PRINTING OFFICE: 1949

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	14
Reasons for granting the writ	15
Conclusion	23
Appendix A	24
Appendix B	26

CITATIONS

Cases:

Bauman v. *Ross*, 167 U.S. 548	19
Boom v. *Patterson*, 98 U.S. 403	21
Brooks-Scanlon Corp. v. *United States*, 265 U.S. 106	18
Danforth v. *United States*, 308 U.S. 271	18
Davis v. *Newton Coal Co.*, 267 U.S. 292	19
Kieselbach v. *Commissioner of Internal Revenue*, 317 U.S. 399	18
Monongahela Navigation Co. v. *United States*, 148 U.S. 312	18
Olson v. *United States*, 292 U.S. 246	20
Ralph v. *Hasen*, 93 F. 2d 68	21
Seaboard Air Line Ry. Co. v. *United States*, 261 U.S. 299	19
United States v. *Chandler-Dunbar Co.*, 229 U.S. 53	18, 20
United States v. *Cors*, No. 132, this Term	22
United States v. *John J. Felin & Co., Inc.*, 334 U.S. 624	21
United States v. *Miller*, 317 U.S. 369	18, 20
United States v. *New River Collieries*, 262 U.S. 341	19, 20
United States ex rel. T.V.A. v. *Powelson*, 319 U.S. 266	21
Welch v. *T.V.A.*, 108 F. 2d 95	21
Westchester County Park Commission v. *United States*, 143 F. 2d 688	21

Statutes:

Merchant Marine Act of 1936, as amended, 53 Stat. 1254, 1255, 46 U.S.C. 1242:	
Sec. 902	24

Miscellaneous:

Bonbright, *Valuation of Property* (1937)	
Ch. XI, XII, XVI	16
Page 409	20
Lewis, *Eminent Domain* (3d ed. 1909)	
Sec. 727	16
Page 1232-1233	21

Miscellaneous—Contd. Page

McCormick, *Damages* (1935)
Page 181 20
Page 182 19
Nichols, *Eminent Domain* (2d ed. 1917)
Page 1171-1178 17
Orgel, *Valuation Under Eminent Domain* (1936)
Ch. XIV, XV, XVII-XIX 16
Sedgwick, *Damages* (9th ed. 1912)
Page 1543 19
3 Williston, *Sales* (Rev. ed. 1948)
§ 599 19
§ 599e 19

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 624

THE UNITED STATES, PETITIONER

v.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on December 6, 1948.

OPINION BELOW

The opinion of the Court of Claims (R. 14-25) is reported at 81 F. Supp. 237.

JURISDICTION

The judgment of the Court of Claims was entered on December 6, 1948 (R. 25). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the just compensation payable for a vessel requisitioned by the United States in 1942, after an eight-year period of idleness, may be determined on the basis of capitalization of the earnings realized from the enterprise in which the ship was used during the period from 1916 to 1932.

2. Whether, in determining just compensation for a vessel requisitioned in 1942 on the Great Lakes, the court may disregard a definite demand and prices prevailing for such vessels in that area because they did not reflect the most profitable use for which the vessels were physically adaptable, in favor of a more profitable demand on the Atlantic coast of Florida, in the absence of any showing or finding that the owner would have availed himself of the latter market.

STATUTE INVOLVED

The pertinent provisions of the Merchant Marine Act of 1936, as amended, 53 Stat. 1254, 1255, 46 U.S.C. 1242, are set forth in Appendix A, *infra*, p. 24.

STATEMENT

The findings of the Court of Claims (R. 4-14) disclose the following pertinent facts:

1. The *Maitland No. 1*, a car ferry, was built in 1916 for the carriage of railway freight cars on the Great Lakes. The vessel had a gross tonnage of 2,757 tons, with four railroad tracks on the car deck, having a capacity of 30 freight cars of the size in use in 1916 or 26 of the larger, modern type in use in 1942 (Finding 6, R. 5). The ves-

sel cost the original owner approximately $362,800. In August 1916, respondent acquired the vessel at a cost of $394,560, a mark-up of about 8.75 per cent (Finding 7, R. 5). Expenditures of $38,115.46 were made by respondent from 1917 to 1930 for additions and betterments to the vessel (Finding 8, R. 5).

From October 1916 to June 1932, respondent operated the *Maitland No. 1* on Lake Erie, between the ports of Ashtabula, Ohio, and Port Maitland, Canada, a distance of 91 miles. The vessel carried commodities loaded in freight cars moving between points in the Pittsburgh area, served by the New York Central Railroad, and points in Canada served by the Toronto, Hamilton and Buffalo Railway Company, and afforded a short cut from the rail route, which moved around the end of Lake Erie and through the congested Buffalo area (Finding 9, R. 5-6).

The *Maitland No. 1* was the only vessel owned and operated by respondent on its car ferry line. Respondent's chief source of revenue was derived from the transportation of bituminous coal to Canada, and its annual income over the sixteen and one-half years of operation fluctuated in accordance with the coal carried. From August 12, 1916, to January 1, 1921 respondent's average annual net operating income was $17,216.28. In 1921 and 1922, the car ferry was operated at a net loss. During the next five years (1923 to 1928), the net operating income averaged $129,893.92 per annum. In 1928, the net operating income declined sharply

below the 1927 earnings. This downward trend continued in 1929 and the vessel was operated at a loss in 1930, 1931, and 1932. By June 1932, traffic handled by the vessel had decreased to the extent that respondent laid up the vessel. The operation of the car ferry line was never resumed after that date. For the entire period from August 12, 1916, to June 30, 1932, respondent's annual average net income from the *Maitland No. 1* was $42,816.36, before Federal income taxes. This amounted to 10.41 per cent of respondent's investment (Finding 10, R. 6-7).

The sharp decline in respondent's net operating income from the *Maitland No. 1* in 1928 and 1929 was solely the result of a diversion of traffic to other routes. Prior to 1928 the bulk of traffic handled by respondent consisted of bituminous coal for movement to the Steel Company of Canada at Hamilton, Ontario. In August, 1928, this traffic was diverted to Sodus Point, New York, for movement across Lake Ontario to Hamilton. Most of the remaining traffic was lost in 1932 when the new Welland Canal was opened, enabling lake vessels to take shipments directly to Lake Ontario points. Since June 1932 there has been insufficient traffic available to justify ferry operation (Finding 11, R. 7-8). The vessel remained laid up until November 1935.

On November 29, 1935, respondent chartered the *Maitland No. 1* to the Nicholson Universal Steamship Company, which covered the tracks on the car deck with planking and used the vessel to carry

freight across Lake Michigan. On February 10, 1936 an agreement was made whereby title to the *Maitland No. 1* was transferred to Nicholson for a total consideration of $166,000, and respondent retained the right to recapture the vessel within a specified time. Respondent exercised this right on December 15, 1937, reacquiring title for $92,894.80 (Finding 12, R. 7-8).

Thereafter the vessel was again laid up at Ashtabula, Ohio, the captain and chief engineer remaining on board as shipkeepers, and minor repairs were made from time to time. From January 1, 1938, to August 20, 1942 the average annual cost of repairs was about $300.

2. On August 20, 1942, the War Shipping Administration, acting pursuant to the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1242, requisitioned title to, and possession of, the *Maitland No. 1* on Lake Erie. (Finding 2, R. 4). The next day, a representative of the War Shipping Administration surveyed the vessel and estimated the repairs necessary to place her in operating condition at $34,980 (Finding 14, R. 9). Shortly after the requisition, the War Shipping Administration removed the machinery from the vessel and sold the hull to a purchaser who converted it into a barge (Finding 2, R. 4).

On April 20, 1943, the War Shipping Administration fixed the sum of $72,500 as just compensation for the *Maitland No. 1* (Finding 3, R. 4). On December 21, 1943, respondent notified the

War Shipping Administration that the amount fixed by it was unsatisfactory and that it elected to exercise its statutory right to receive 75 per cent of the award without prejudice to its right to sue for additional compensation. On June 10, 1944, respondent was paid the sum of $54,375 (Finding 4, R. 4).

On May 15, 1945, respondent, alleging that the fair value of the vessel was $766,128 (R. 3),[1] brought suit in the Court of Claims to recover additional compensation for the taking of the *Maitland No. 1* (R. 1-3).

3. The court found that "At the time she was requisitioned, the use to which the *Maitland No. 1* was best adapted was as a car ferry on the Great Lakes. At that time, however, there was no demand for the vessel as a car ferry on Lake Erie and there is no satisfactory proof that there was any demand for her for use as a car ferry elsewhere on the Great Lakes." (Finding 17, R. 9-10).

[1] On the date of requisition, the book value of the vessel, as shown on respondent's records was $75,509.51 (Finding 15, R. 9). This book value had been computed by deducting annual depreciation of four per cent from the $92,894.80 paid by respondent to Nicholson Universal Steamship Company on the "recapture" of the vessel, as described above (*supra*, p. 5). However, since respondent had initially taken depreciation from October 1, 1916, to December 31, 1919, at a rate of one per cent per annum and thereafter at the annual rate of four per cent, if the sale to Nicholson and the subsequent recapture are ignored as not representing *bona fide* sales, the net book value on August 20, 1942, would have been $37,096.13. From January 1, 1938, to August 20, 1942, respondent maintained insurance on the *Maitland No. 1* based on a valuation of $100,000 (Finding 16, R. 9).

Most operation of car ferries on the Great Lakes has centered on Lake Michigan and the Detroit River. The only car ferries which have ever operated elsewhere on the Great Lakes, so far as the present record discloses, are the *Maitland No. 1*, the *Ashtabula*, owned by the Pennsylvania Railroad, and the *Marquette and Bessemer No. 2*, jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Railway Company, all three of which operated across Lake Erie from Ohio to Canada. As noted above, lack of traffic and its diversion to other routes had caused respondent to take the *Maitland No. 1* out of service in the middle of 1932. The Pennsylvania Railroad continued the operation of its car ferry, since unlike the New York Central, it did not control a rail route into Canada. Neither in 1942 nor at any time subsequent thereto has the Pennsylvania Railroad required an additional car ferry to handle its traffic. The *Marquette and Bessemer No. 2*, referred to above, was laid up in 1931, was not operated thereafter, and was sold in March 1942 for $37,724.04.

With the exception of car ferries operated across the Detroit River, where an entirely different type of boat was used under different traffic conditions, the balance of the car ferries on the Great Lakes operated across Lake Michigan, chiefly between points in Michigan and in Wisconsin. Until about 1930, these car ferries held a competitive advantage over the all-rail transportation, both in respect

of time and rates. By 1930, the railroads completed "an outer belt" railroad around the City of Chicago, thus avoiding long delays, and the car ferry rate differential was abolished. Also, changes in traffic on the ferry lines required more clearance between the car decks and the cabin decks of the vessels. Thereafter, the ferry lines were unable to compete successfully with the all-rail routes. Vessels of the *Maitland No. 1* type became obsolete for further use as car ferries on the Great Lakes. By 1936 the majority of these outmoded car ferries had been laid up and were replaced by larger vessels, having greater speed, larger cargo capacity and passenger facilities (Finding 17, R. 9-10).

Accordingly, in 1942, the only demand on the Great Lakes for the *Maitland No. 1* was for a number of secondary uses, but such a demand for non-car-ferry uses did exist (Finding 18, R. 10). Between 1936 and 1940 three car ferries, similar to the *Maitland No. 1,* which had been laid up for a number of years, were sold for conversion to highway ferries (for transporting automobiles and passengers) in the Great Lakes area. In 1936, the Ann Arbor Railroad sold the car ferry *Ann Arbor No. 4,* which was smaller than the *Maitland No. 1,* to the Michigan Highway Department for $25,000. In 1938, the Pere Marquette Railway Company sold the car ferry *Pere Marquette No. 20,* which had been built in 1903 from the same plans as the *Maitland No. 1,* to the Michigan Highway Department for the price of $50,000, plus an additional $10,000 for delivering the vessel across Lake Mich-

igan to a shipyard. In 1940, the Pere Marquette Railway Company sold the car ferry *Pere Marquette No. 17,* which had been built in 1901 (from the same plans as the *Maitland No. 1,*) to the Michigan Highway Department for $65,000 (Finding 18, R. 10-11). Although the *Pere Marquette Nos. 17 and 20* were comparable to the *Maitland No. 1* in size, carrying capacity, speed and design, they were in a poorer state of repair on the dates sold than was the *Maitland No. 1* on the date of requisition (Finding 19, R. 11).

In 1940 and 1942, two other obsolete car ferries, which had been laid up and which likewise were in a poorer state of repair than the *Maitland No. 1,* were sold to purchasers who removed the engines from the boilers, tore off the superstructure of the vessels, and used them as bulk carriers of pulpwood. In July 1940, the Pere Marquette Railway Company sold the *Pere Marquette No. 19* for $24,000. The vessel was built from the same plans as the *Maitland No. 1* and was a sister ship of the *Pere Marquette No. 20,* referred to above. In March, 1942, the *Marquette and Bessemer No. 2* was sold for $37,724.04. She had been built in 1910 from the same plans as the *Maitland No. 1,* was jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Railway Company and had formerly been used as a car ferry on Lake Erie (Finding 21, R. 13-14).

4. The Court of Claims then went on to find that there was a demand in 1942 on the Atlantic Coast

for vessels such as the *Maitland No. 1* for use as a car ferry between Florida and Cuba (Finding 20, R. 12).

In May, 1941, the Florida East Coast Railroad Company sold the *Henry M. Flagler,* a car ferry which had operated between Florida and Cuba for $100,000. The *Flagler* was built in 1914 from substantially the same plans as the *Maitland No. 1* but was equipped to operate in and had been used in salt water. As in the case of the *Maitland No. 1,* the *Flagler* had been laid up for ten years prior to the sale. Between May, 1941 and July 28, 1941, the purchaser expended $65,820 for necessary repairs. On July 28, 1941, the W. S. A. requisitioned the vessel and appraised her value at $170,000, which the owner accepted as just compensation (Finding 20, R. 12).

In June, 1942, the W. S. A. requisitioned two ocean-going car ferries, the *Joseph R. Parrott* and the *Estrada Palma,* comparable in age, dimensions and construction to the *Maitland No. 1,* which were owned by the Florida East Coast Railroad Company and had been operated by that company between Florida and Cuba. By negotiation between the parties, a value of $332,500 for each vessel was agreed upon, and the company accepted $665,000 in full payment (Finding 20, R. 12-13).

Shortly after the cessation of hostilities in World War II, the Grand Trunk Railway Company sold the *Grand Haven,* a car ferry formerly operated on the Great Lakes, for $50,000. The *Grand Haven*

was built in 1903, was smaller than the *Maitland No. 1* but had more speed and power. At considerable expense, the amount of which is not shown in the record, she was floated down the Mississippi River and converted for use as a ferry between Florida and Cuba (Finding 20, R. 12).

At the time of the requisition of the *Maitland No. 1* it would have cost not less than $115,000 to move her to the Atlantic Coast and fit her for operation in salt water. In addition, some strengthening of the framing would probably have been required before the *Maitland No. 1* could be classified for ocean-going service. There is no evidence as to how much these additional changes would have cost (Finding 20, R. 13).

5. After making the foregoing findings, the court concluded, in its opinion, that the fair value for the *Maitland* must be determined as of the putative Florida location, and that since the sales transactions described above did not establish a sufficiently fair and adequate value for the vessel, resort must be had to other methods to establish her value (R. 22-23). Despite the fact that the *Maitland No. 1* had been laid up since June 1932 and respondent had filed an application with the Interstate Commerce Commission on February 11, 1943, for leave to abandon its car ferry line because "traffic is not available in sufficient quantities to warrant continued operation, even if a suitable car ferry were available" (Finding 11, R. 8), the court declared "we are compelled to resort to a con-

sideration of the earnings of the *Maitland No. 1* during the time the vessel was actually operated as a car ferry, in conjunction with the contemporaneous transactions in vessels of close similarity in determining a fair value" (R. 23).

Attributing an average mean residual value of $50,000 to the *Maitland No. 1* as an obsolete car ferry, the court capitalized the average annual income of $42,816.36 received from 1916 to 1932 at an annual rate of 10 per cent for the estimated 24 years of useful life remaining and arrived at the sum of $389,767.15 (R. 23). The court then noted that "This figure approximates the amount paid by defendant to Florida East Coast Car Ferry Company for the car ferries, *Joseph R. Parrott* and *Estrada Palma*" (R. 24). Since the normal useful life of a car ferry operated in salt water is only 80 per cent of such a ferry operated in fresh water, the court reduced the value of the *Maitland No. 1* by 20 per cent to $311,813.72. Next, the estimated necessary repairs of $34,980 (Finding 14, R. 9) were deducted. Finally, since it would have cost at least $115,000 to move the *Maitland No. 1* to the Atlantic Coast and fit her for salt water operation, that sum was also deducted, leaving a balance of $161,833.72 (R. 24). Although the court found that there had been an enhancement of $11,420 in the value of vessels in the Atlantic Coast between 1941 and 1942 because of the greater demand for vessels which occurred after the beginning of World War II (Finding 20,

R. 13), such enhancement was ignored in making this computation.

The court, with two judges dissenting, concluded that the fair value at the time of taking was $161,833.72. Since petitioner was entitled to credit for the sum of $54,375 paid on June 10, 1944, interest was awarded respondent at 4 per cent per annum for delay in payment on $161,833.72 from August 20, 1942, to June 10, 1944, and on $107,458.72 from June 10, 1944 to date of payment (R. 24).

Judge Whitaker (with whom Madden, J. concurred) dissenting, was of the opinion that the capitalization of earnings was improper because "at the time of its requisition it was earning nothing and had earned nothing for quite a long time" (R. 24). Adverting to the price at which comparable vessels sold on the Florida East Coast, he pointed out that this basis for valuation "presupposes that the owner of this vessel on the Great Lakes would have been able to sell his vessel after he had transported it down there, and there is no showing whatever that it would have been able to do so. I feel quite sure that plaintiff would not have gone to the expense of $115,000 to transport the vessel to the Florida East Coast in the hope of finding a purchaser there. Just compensation is to be determined not only as of the time of the taking but also as of the place of taking. * * * The War Shipping Administration fixed $72,500 as just compensation. I do not think the plaintiff has carried the burden of showing that this was incorrect" (R. 25).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In making an award of just compensation for the *Maitland No. 1* which was not based on a determination of the value the vessel had at the place of taking (the Great Lakes) but the value which it might have had if it were located on the Atlantic coast of Florida.

2. In making an award of just compensation for the *Maitland No. 1* (which was taken in August 1942), predicated upon a capitalization of respondent's realized earnings during the period from 1916 to 1932.

3. In making an award of just compensation for the *Maitland No. 1* which was not based on a determination of value at the time and place of taking.

4. In disregarding its findings of the evidentiary or primary facts in making its ultimate finding that "the fair value of the *Maitland No. 1* at the time of the requisition was $161,833.72."

5. In making an ultimate finding (that the fair value was $161,833.72) which was not sustained by its findings of the evidentiary or primary facts.

6. In failing to deduct, as required by Section 902 of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1242, from its ultimate finding of the fair value of the *Maitland No. 1,* the sum of $11,420 found to represent the enhancement of value due to the greater demand for vessels after the beginning of World War II.

7. In failing to make the ultimate finding that

the fair value of the *Maitland No. 1* at the time and place of taking was no more than $72,500.

8. In failing to hold that respondent has not carried the burden of showing that the sum of $72,500 fixed by the War Shipping Administration as just compensation for the *Maitland No. 1* was incorrect.

9. In entering judgment for respondent in the amount of $107,458.72, with interest at 4 per cent per annum for delay in payment on $161,833.72 from August 20, 1942, to June 10, 1944, and on $107,458.72 from June 10, 1944, to date of payment.

REASONS FOR GRANTING THE WRIT

In determining the just compensation to be paid for the taking of the *Maitland No. 1* in August 1942 at the Great Lakes, the Court of Claims has resorted to the doubly novel procedure, first, of basing its award largely upon a capitalization of respondent's realized income from 1916 to 1932, despite the fact that the vessel had been laid up for eight years and was obsolete for further use as a car ferry on the Great Lakes, and, secondly, of relying heavily on a demand and possible market for a vessel such as the *Maitland* as a car ferry on the east coast of Florida, some thousands of miles from the place of taking, even though a definite demand did exist at the Great Lakes for such ships for secondary, non-car-ferrying uses. These unusual and erroneous rulings sharply depart from the accepted principles of eminent domain, and raise important and substantial questions bearing on pending just compensation litigation for merchant ships requisitioned during the war.

1. Assuming that no actual market value could be ascertained, the court below stated "we are compelled to resort to a consideration of the earnings of the *Maitland No. 1* during the time that the vessel was actually operated as a car ferry * * *" (R. 23). By capitalizing the average annual income of $42,816.36 earned by respondent from 1916 to 1932 at an annual rate of 10 per cent for the estimated remaining 24 years of use for the ship, and attributing an average mean residual value of $50,000 to it as an obsolete car ferry, the court obtained the basic sum of $389,767.15 (R. 23).[2] We submit, however, that the court erred seriously in assigning a value to the *Maitland* grounded on capitalization of respondent's realized income. It must be borne in mind that that which was requisitioned was not the business enterprise of respondent, but a vessel which was used in the business. Whatever the merits of capitalization of income when an entire business enterprise, such as a public utility, is condemned (Bonbright, *Valuation of Property* (1937), ch. XI, XII, XVI, *passim;* Orgel, *Valuation Under Eminent Domain* (1936), ch. XIV, XV, XVII-XIX, *passim*), that method can be clearly misleading when employed to estimate the value of property owned by the business enterprise. Cf. Lewis, *Eminent Domain* (3d ed. 1909) § 727; Nichols, *Eminent Domain* (2d ed. 1917), pp. 1171-1173 (realty). Before

[2] The process by which this figure was reduced to $161,833.72 in order to take into account the cost of making it available on salt water, and in Florida, is described on page 12, *supra*.

such evidence could properly be considered competent, some means would have to be devised whereby measurable shares of the total earnings could be allocated to the respective income producing factors of invested capital, management skill, and general business conditions. Moreover, a capitalization of profits already realized means nothing, unless these profits may reasonably be expected to continue.

Applying these considerations to the case at bar, it is plain that no reliance can be placed upon such capitalization. During the sixteen and one-half years of operation of the *Maitland,* the average annual net income of respondent fluctuated as follows: 1916 to 1921—$17,216.28; 1921 to 1922—net loss; 1925 to 1928—$129,893.92; 1930 to 1932—net loss (Finding 10, R. 6). On its face, such variation in income shows that it would be impossible to attribute any particular fraction of the earnings to the vessel itself. As the findings reveal (Finding 11, R. 7-8), the income of respondent was dependent upon the adequacy of other traffic routes and not upon any income producing qualities inherent in the *Maitland. Supra,* pp. 3-4. Even if this obstacle of allocation were surmountable, the fact remains that respondent has not operated its car ferry line since June 1932; at no time since that date has there been traffic sufficient to justify vessel operation (Finding 11, R. 8). It is inconceivable that a "willing buyer" would give any weight to capitalized earnings which neither had continued in the

past nor could be expected to continue. If demand is lacking for a property because it is non-productive, it cannot be urged that its present value may, nevertheless, be measured by its past earnings. Nor does the possibility of profitable operation of the *Maitland* as a car ferry between Florida and Cuba affect the bearing of capitalization of realized income upon the vessel's current value. Conceivably, capitalized prospective earnings would be relevant; however, it is sheer speculation to estimate the value of the *Maitland* as an ocean car ferry from its income, from twenty-five to ten years before, as a fresh water car ferry. Such income was earned under other management, was derived mainly from the transportation of coal, was subject to all-rail competition, and, in short, resulted from a host of different factors.

Finally, it is evident that such uncritical use of capitalization of income realized from 1916 to 1932, to determine fair value in 1942, violates the unquestioned rule that value is to be ascertained as of the time of taking. See *United States* v. *Miller*, 317 U.S. 369, 374; *Kieselbach* v. *Commissioner of Internal Revenue*, 317 U.S. 399, 403; *Danforth* v. *United States*, 308 U.S. 271, 283; *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 123; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 76; *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 341.

2. a. Although the *Maitland* was requisitioned in the Great Lakes area where a demand existed for such vessels for secondary uses (*supra*, pp.

8-9), the Court of Claims predicted its higher finding of value in large part on the existence of a demand for similar ships on the Florida East Coast for use as car ferries between Florida and Cuba.[3] But the general rule, announced by this Court in dictum, is that just compensation for personal property must be determined as of the place of taking, especially when there is a market for the commodity at that spot (*United States* v. *New River Collieries Co.*, 262 U.S. 341, 344; *Davis* v. *Newton Coal Co.*, 267 U.S. 292, 301). The rule as thus formulated is identical with the measure of damages for breach of contract or for tortious conversion. In actions for breach of contract, the market value at the time and place where the contract should have been performed is the basis for assessing damages. In cases of wrongful destruction of, or injury to, personal property, the market value of the place of wrong is used. See 3 Williston, *Sales* (Rev. ed., 1948), §§ 599, 599e; Sedgwick, *Damages* (9th ed., 1912), p. 1543; McCormick, *Damages* (1935), p. 182. In all these cases, the purpose of the judgment is to indemnify the plaintiff for his loss, without more,[4] and an award of market value at the time

[3] For the purposes of this petition, no exception is taken to the finding of the lower court that a demand did exist, at the time of taking, on the Florida East Coast for a vessel such as the *Maitland No. 1* for use as a car ferry (Finding 20, R. 12). However, it should be pointed out that the court made no finding that if the *Maitland* had been transported to the Atlantic coast it would have been sold for that purpose. See *infra*, pp. 21-22).

[4] *Bauman* v. *Ross*, 167 U. S. 548, 574; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304; *United States* v.

and place of the taking or wrong constitutes a fair measure of the loss, since that is the sum for which the plaintiff would presumably have sold the property to another or can now replace it for his own use.

Here, the court concedes that there were a number of secondary uses for the *Maitland* for which a demand did exist in 1942 on the Great Lakes (Finding 18, R. 10), and the findings reveal that (aside from the 1937 sale of the vessel itself) five vessels of the car-ferry type had been sold on the Great Lakes, during the period from 1936 to 1942, at prices ranging from $24,000 to $65,000 (Findings 18-21, R. 10-14). *Supra,* pp. 8-9. This definite home market was disregarded because there was no demand in that vicinity for the car-ferry use which would have been the most profitable employment for the vessel (R. 23). But the law of just compensation does not require property to be valued at its highest price, wherever that highest market may happen to be. True, consideration should be given to the "highest and most profitable use for which the property is adaptable", but only if the need or likelihood of need for such use exists "in the reasonably near future", and only to the extent that "the prospect of demand for such use affects the market value while the property is privately held." *Olson* v. *United States,* 292 U.S. 246, 255; see also

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New River Collieries, 262 U. S. 341, 343; *United States* v. *Miller,* 317 U. S. 369, 373; Bonbright, *Valuation of Property* (1937), p. 409; McCormick, *Damages* (1935), p. 181.

Boom v. *Patterson*, 98 U.S. 403, 408; *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 81; Lewis, *Eminent Domain* (3rd ed. 1909), pp. 1232-1233. The proper inquiry is not what might be the value of the property for a particular use if it were located at some other part of the country, but what it is now worth in the available market, in view of its adaptability for that special use and all others. If the particular use does not affect the market price in the place of taking because of the character of the existing demand, the concept of fair value as indemnification does not require that resort be had to other, distant, markets, unless the owner shows clearly that he would actually have dealt in those places. Without such a showing, to select the location of greatest value, as the Court of Claims did here, would normally grant a windfall to the owner who would receive more than he would probably have gotten from a private purchaser or than he would have to pay for a replacement.

On the respondent rests the burden of proving all the elements of its claim for just compensation (*United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 273; *United States* v. *John J. Felin & Co., Inc.*, 334 U.S. 624, 631; *Westchester County Park Commission* v. *United States*, 143 F. 2d 688, 692 (C.A. 2); *Ralph* v. *Hazen*, 93 F. 2d 68, 70 (C.A.D.C.); *Welch* v. *T.V.A.*, 108 F. 2d 95, 101 (C.A. 6)), but it made no proof that it would have sold, or attempted to sell, the *Maitland* on the Atlantic coast of Florida. Owners of bulky property,

like ships, do not ordinarily expend large sums (here, $115,000) for transportation to higher markets on the chance that a sale might be made there at a better price. And the Court of Claims made no finding that respondent would have been able to sell the vessel had it been transported to the coast, nor that respondent would have gone to the expense of placing the *Maitland* on the Florida market in the hope of finding a purchaser. The court likewise made no finding that a demand existed on the Great Lakes for vessels of this type to be transported to the Atlantic seaboard and fitted for operation as an ocean car-ferry.[5] In fine, there was no warrant for discarding the demand existing at the place of taking for vessels like the *Maitland*, and basing the award on a different demand which existed only at a single distant spot.[6]

b. Twenty-four cases involving claims totaling $9,817,537.57 for vessels requisitioned on the Great Lakes are presently pending in the lower courts.[7] It is anticipated that, in reliance upon the decision below, an attempt will be made to secure awards grounded on the higher prices prevailing on the

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[5] In fact, the only comparable vessel that was acquired for such purpose sold for $50,000 (R. 12), less than the administrative award offered respondent.

[6] The Court of Claims also erred in not deducting from the value it found for the *Maitland* on the Atlantic coast the enhancement of $11,420 which occurred, as the court found, between 1941 and 1942 because of the greater demand for vessels after the beginning of World War II (Finding 20, R. 13). Cf. Brief for the United States, *United States* v. *Cors*, No. 132, this Term, now pending decision.

[7] See Appendix B, *infra*, p. 26.

Atlantic coast, without any showing that these coastal markets were available or normal for Great Lakes vessels. The instant holding indicates that the Court of Claims will be receptive to such contentions, with the result that inflated judgments will be granted in this class of ship requisition cases.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1949.

APPENDIX A

Section 902 of the Merchant Marine Act of 1936, as amended, 53 Stat. 1254, 1255 (46 U.S.C. 1242) provides, in part, as follows:

> (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.
>
> * * * * *
>
> (d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon

as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U.S.C., 1934 edition, title 28, secs. 41, 250).

APPENDIX B

Pending Just Compensation Cases Involving Vessels on Great Lakes

Vessel	*Owner*	*Claim*
A. H. Smith	Great Lakes Transit Corp.	$ 2,253.21
Back Bay	Gartland SS Co.	269,596.00
Bennington	Gartland SS Co.	94,364.00
Brockton	Gartland SS Co.	230,645.00
C. T. Jaffray	Great Lakes Transit Corp.	1,005.90
Daniel Willard	Great Lakes Transit Corp.	395.32
Duluth	Great Lakes Transit Corp.	407.42
Edward Chambers	Great Lakes Transit Corp.	974.31
Fred W. Sargent	Great Lakes Transit Corp.	2,748.43
Fleetwood	Nicholson Transit Co.	270,000.00
George D. Dixon	Great Lakes Transit Corp.	387.32
J. E. Gorman	Great Lakes Transit Corp.	1,241.19
H. A. Scrandrett	Great Lakes Transit Corp.	1,038.30
J. M. Davis	Great Lakes Transit Corp.	707.25
Lucinda Clark	Waterways Transp. Inc.	24,100.00
Mizpah	Eugene F. McDonald, Jr.	348,750.00
Octorara	Sand Products Corp.	1,003,333.33
Ontario	Tugboat Ontario Inc.	202,059.50
P. E. Crowley	Great Lakes Transit Corp.	534.92
Sable	Detroit & Cleveland Nav. Co.	7,348,570.00
Spikes	A. J. Huch, exec.	10,000.00
Utica	Great Lakes Transit Corp.	2,257.13
W. J. Conners	Great Lakes Transit Corp.	436.50
W. W. Atterbury	Great Lakes Transit Corp.	732.54
		$9,817,537.57

Source: Appendix D to Brief for the United States in *United States* v. *Cors*, this Term, No. 132, checked against Green's Great Lakes Directory, 1942 edition.

☆ U. S. Government Printing Office, 1949 J827459/463

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	14
Summary of argument	15
Argument	20
I. The court below improperly determined the value of the Maitland by relying upon a capitalization of the realized earnings of the enterprise in which she was used during the period from 1916 to 1932 on the Great Lakes	22
II. A demand existing in Florida for a vessel of the type of the *Maitland* and the contemporaneous requisition sales of two comparable vessels in 1942 in Florida, furnish no support for the valuation fixed by the Court below through capitalization of past earnings	31
III. The findings disclose that the value assigned to the *Maitland* by the War Shipping Administration was generous	39
Conclusion	43
Appendix	44

CITATIONS

Cases:

Bauman v. *Ross*, 167 U. S. 548	33
Boom v. *Patterson*, 98 U. S. 403	34
Brooks-Scanlon Corp. v. *United States*, 265 U. S. 106	30, 33
Danforth v. *United States*, 308 U. S. 271	30
Davis v. *Newton Coal Co.*, 267 U. S. 292	32
Kieselbach v. *Commissioner of Internal Revenue*, 317 U. S. 399	30
Kimball Laundry v. *United States*, 338 U. S. 1	23, 24, 25, 35, 41
Monongahela Navigation Co. v. *United States*, 148 U. S. 312	30-31
Olson v. *United States*, 292 U. S. 246	33, 34
Ralph v. *Hazen*, 93 F. 2d 68	37
Seaboard Air Line Ry. Co. v. *United States*, 261 U. S. 299	33
Standard Oil Co. v. *So. Pacific Co.*, 268 U. S. 146	33
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53	30, 33, 34
United States v. *Cors*, 337 U. S. 325	22, 32, 35, 36, 39

Page

United States v. *General Motors Corp.*, 323 U. S. 373 ... 35
United States v. *John J. Felin & Co., Inc.*, 334 U. S. 624 ... 37
United States v. *Miller*, 317 U. S. 369 ... 23, 30, 33, 36, 41
United States v. *New River Collieries Co.*, 262 U. S. 341, 23, 32, 33
United States v. *Petty Motor Co.*, 327 U. S. 372 ... 24, 36
United States ex rel. T. V. A. v. *Powelson*, 319 U. S. 266, 34, 36, 37
Welch v. *T. V. A.*, 108 F. 2d 95 ... 37
Westchester County Park Commission v. *United States*, 143 F. 2d 688 ... 37

Constitution and Statute:

Constitution of the United States:
Fifth Amendment ... 22
Merchant Marine Act of 1936, as amended, 53 Stat. 1254, 1255, 46 U. S. C. 1242:
Sec. 902 ... 44

Miscellaneous:

I Bonbright, *Valuation of Property* (1937):
p. 250 ... 25
pp. 408-409 ... 33
Ch. XI, XII, XVI ... 24

II Lewis, *Eminent Domain* (3rd ed. 1909):
Sec. 706 ... 34
Sec. 727 ... 24

McCormick, *Damages* (1935):
p. 182 ... 27
Sec. 44 ... 33, 41
Sec. 47 ... 33

Nichols, *Eminent Domain* (2d ed. 1917):
pp. 1171-1173 ... 24
Secs. 217, 222 ... 41
Sec. 219 ... 34

Orgel, *Valuation under Eminent Domain* (1936):
pp. 533, 562, fn. 2 ... 24
Ch. XIV, XV, XVII-XIX ... 24

Restatement, *Contracts* (1932), § 329, comment *a* ... 33
Rule 3, Report of the Advisory Board on Just Compensation to the War Shipping Administration, 1943 A. M. C. 1443 ... 23

Sedgwick, *Damages* (9th ed. 1912):
Vol. 1, Sec. 244 ... 33
Vol. 2, Sec. 434 ... 33

Page

V Williston, *Contracts* (Rev. ed. 1937), Sec. 1338 33

III Williston, *Sales* (Rev. ed. 1948):

Sec. 596 33
Sec. 597 33
Sec. 599 33
Sec. 599e 33

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 39

THE UNITED STATES, PETITIONER

v.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 14-25) is reported at 112 C. Cls. 240.

JURISDICTION

The judgment of the Court of Claims was entered on December 6, 1948 (R. 25). The petition for a writ of certiorari was filed on March 3, 1949, and was granted on May 2, 1949. The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the just compensation payable for a vessel requisitioned by the United States in 1942, after an eight-year period of idleness, may be determined on the basis of capitalization of the earnings realized from the enterprise in which the ship was used during the period from 1916 to 1932.

2. Whether, in determining just compensation for a vessel requisitioned in 1942 on the Great Lakes, the court may disregard a definite demand and prices prevailing for such vessels in that area because they did not reflect the most profitable use for which the vessels were physically adaptable, in favor of a more profitable demand on the Atlantic coast of Florida, in the absence of any showing or finding that the owner would have availed himself of the latter market.

STATUTE INVOLVED

The pertinent provisions of the Merchant Marine Act of 1936, as amended, 53 Stat. 1254, 1255, 46 U.S.C. 1242, are set forth in the Appendix, *infra*, pp. 44-45.

STATEMENT

The findings of the Court of Claims (R. 4-14) disclose the following pertinent facts:

1. The *Maitland No. 1*, a car ferry, was built in 1916 for the carriage of railway freight cars on the Great Lakes. The vessel had a gross tonnage of 2,757 tons, with four railroad tracks on the car deck, having a capacity of 30 freight cars of the

size in use in 1916, or 26 of the larger, modern type in use in 1942 (Finding 6, R. 5). The vessel cost the original owner approximately $362,800. In August 1916, respondent acquired the vessel at a cost of $394,560, a mark-up of about 8.75 per cent (Finding 7, R. 5). Expenditures of $38,115.46 were made by respondent from 1917 to 1930 for additions and betterments to the vessel (Finding 8, R. 5).

From October 1916 to June 1932, respondent operated the *Maitland No. 1* on Lake Erie, between the ports of Ashtabula, Ohio, and Port Maitland, Canada, a distance of 91 miles. The vessel carried commodities loaded in freight cars moving between points in the Pittsburgh area, served by the New York Central Railroad, and points in Canada served by the Toronto, Hamilton and Buffalo Railway Company, and afforded a short cut from the rail route, which moved around the end of Lake Erie and through the congested Buffalo area (Finding 9, R. 5-6).

The *Maitland No. 1* was the only vessel owned and operated by respondent on its car ferry line. Respondent's chief source of revenue was derived from the transportation of bituminous coal to Canada, and its annual income over the sixteen and one-half years of operation fluctuated in accordance with the coal carried. From August 12, 1916, to January 1, 1921, respondent's average annual net operating income was $17,216.28. In 1921 and 1922, the car ferry was operated at a net

loss. During the next five years (1923 to 1928), the net operating income averaged $129,893.92 per annum. In 1928, the net operating income declined sharply below the 1927 earnings. This downward trend continued in 1929 and the vessel was operated at a loss in 1930, 1931, and 1932. By June 1932, traffic handled by the vessel had decreased to the extent that respondent laid up the vessel. The operation of the car ferry line was never resumed after that date. For the entire period from August 12, 1916, to June 30, 1932, respondent's annual average net income from the *Maitland No. 1* was $42,816.36, before Federal income taxes. This amounted to 10.41 per cent of respondent's investment (Finding 10, R. 6-7).

The sharp decline in respondent's net operating income from the *Maitland No. 1* in 1928 and 1929 was solely the result of a diversion of traffic to other routes. Prior to 1928 the bulk of traffic handled by respondent consisted of bituminous coal for movement to the Steel Company of Canada at Hamilton, Ontario. In August, 1928, this traffic was diverted to Sodus Point, New York, for movement across Lake Ontario to Hamilton. Most of the remaining traffic was lost in 1932 when the new Welland Canal was opened, enabling lake vessels to take shipments directly to Lake Ontario points. Since June 1932, there has been insufficient traffic available to justify ferry operation (Finding 11, R. 7-8). The vessel remained laid up until November 1935.

On November 29, 1935, respondent chartered the *Maitland No. 1* to the Nicholson Universal Steamship Company, which covered the tracks on the car deck with planking and used the vessel to carry freight across Lake Michigan. On February 10, 1936, an agreement was made whereby title to the *Maitland No. 1* was transferred to Nicholson for a total consideration of $166,000, and respondent retained the right to recapture the vessel within a specified time. Respondent exercised this right on December 15, 1937, reacquiring title for $92,894.80 (Finding 12, R. 7-8).

Thereafter the vessel was again laid up at Ashtabula, Ohio, the captain and chief engineer remaining on board as shipkeepers, and minor repairs were made from time to time. From January 1, 1938, to August 20, 1942, the average annual cost of repairs was about $300.

2. On August 20, 1942, the War Shipping Administration, acting pursuant to the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1242, requisitioned title to, and possession of, the *Maitland No. 1* on Lake Erie. (Finding 2, R. 4). The next day, a representative of the War Shipping Administration surveyed the vessel and estimated the repairs necessary to place her in operating condition at $34,980 (Finding 14, R. 9). Shortly after the requisition, the War Shipping Administration removed the machinery from the vessel and sold the hull to a purchaser who converted it into a barge (Finding 2, R. 4).

On April 20, 1943, the War Shipping Administration fixed the sum of $72,500 as just compensation for the *Maitland No. 1* (Finding 3, R. 4). On December 21, 1943, respondent notified the War Shipping Administration that the amount fixed by it was unsatisfactory and that it elected to exercise its statutory right to receive 75 per cent of the award without prejudice to its right to sue for additional compensation. On June 10, 1944, respondent was paid the sum of $54,375 (Finding 4, R. 4).

On May 15, 1945, respondent, alleging that the fair value of the vessel was $766,128 (R. 2),[1] brought suit in the Court of Claims to recover additional compensation for the taking of the *Maitland No. 1* (R. 1-3).

3. The lower court found that "At the time she was requisitioned, the use to which the *Maitland No. 1* was best adapted was as a car ferry on the Great Lakes. At that time, however, there was no

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[1] On the date of requisition, the book value of the vessel, as shown on respondent's records was $75,509.51 (Finding 15, R. 9). This book value had been computed by deducting annual depreciation of four per cent from the $92,894.80 paid by respondent to Nicholson Universal Steamship Company on the "recapture" of the vessel, as described above (*supra*, p. 5). However, since the respondent had initially taken depreciation from October 1, 1916, to December 31, 1919, at a rate of one per cent per annum and thereafter at the annual rate of four per cent, if the sale to Nicholson and the subsequent recapture are ignored as not representing *bona fide* sales, the net book value on August 20, 1942, would have been $37,096.13. From January 1, 1938, to August 20, 1942, respondent maintained insurance on the *Maitland No. 1* based on a valuation of $100,000 (Finding 16, R. 9).

demand for the vessel as a car ferry on Lake Erie and there is no satisfactory proof that there was any demand for her for use as a car ferry elsewhere on the Great Lakes." (Finding 17, R. 9-10).

Most operation of car ferries on the Great Lakes has centered on Lake Michigan and the Detroit River. The only car ferries which have ever operated elsewhere on the Great Lakes, so far as the present record discloses, are the *Maitland No. 1,* the *Ashtabula,* owned by the Pennsylvania Railroad, and the *Marquette and Bessemer No. 2,* jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Railway Company, all three of which operated across Lake Erie from Ohio to Canada. As noted above, lack of traffic and its diversion to other routes had caused respondent to take the *Maitland No. 1* out of service in the middle of 1932. The Pennsylvania Railroad continued the operation of its car ferry, since unlike the New York Central, it did not control a rail route into Canada. Neither in 1942 nor at any time subsequent thereto has the Pennsylvania Railroad required an additional car ferry to handle its traffic. The *Marquette and Bessemer No. 2,* referred to above, was laid up in 1931, was not operated thereafter, and was sold in March 1942 for $37,724.04.

With the exception of car ferries operated across the Detroit River, where an entirely different type of boat was used under different traffic conditions, the balance of the car ferries on the Great Lakes

operated across Lake Michigan, chiefly between points in Michigan and in Wisconsin. Until about 1930, these car ferries held a competitive advantage over the all-rail transportation, both in respect of time and rates. By 1930, the railroads completed "an outer belt" railroad around the City of Chicago, thus avoiding long delays, and the car ferry rate differential was abolished. Also, changes in traffic on the ferry lines required more clearance between the car decks and the cabin decks of the vessels. Thereafter, the ferry lines were unable to compete successfully with the all-rail routes. Vessels of the *Maitland No. 1* type became obsolete for further use as car ferries on the Great Lakes. By 1936 the majority of these outmoded car ferries had been laid up and were replaced by larger vessels, having greater speed, larger cargo capacity and passenger facilities (Finding 17, R. 9-10).

Accordingly, in 1942, the only demand on the Great Lakes for the *Maitland No. 1* was for a number of secondary uses, but such a demand for non-car-ferry uses did exist (Finding 18, R. 10). Between 1936 and 1940 three car ferries, similar to the *Maitland No. 1,* which had been laid up for a number of years, were sold for conversion to highway ferries (for transporting automobiles and passengers) in the Great Lakes area. In 1936, the Ann Arbor Railroad sold the car ferry *Ann Arbor No. 4,* which was smaller than the *Maitland No. 1,* to the Michigan Highway Department for $25,000. In 1938, the Pere Marquette Railway Company sold the car ferry *Pere Marquette No. 20,*

which had been built in 1903 from the same plans as the *Maitland No. 1*, to the Michigan Highway Department for the price of $50,000, plus an additional $10,000 for delivering the vessel across Lake Michigan to a shipyard. In 1940, the Pere Marquette Railway Company sold the car ferry *Pere Marquette No. 17*, which had been built in 1901 from the same plans as the *Maitland No. 1*, to the Michigan Highway Department for $65,000 (Finding 18, R. 10-11). Although the *Pere Marquette Nos. 17* and *20* were comparable to the *Maitland No. 1* in size, carrying capacity, speed and design, they were in a poorer state of repair on the dates sold than was the *Maitland No. 1* on the date of requisition (Finding 19, R. 11).

In 1940 and 1942, two other obsolete car ferries, which had been laid up and which likewise were in a poorer state of repair than the *Maitland No. 1*, were sold to purchasers who removed the engines from the boilers, tore off the superstructure of the vessels, and used them as bulk carriers of pulpwood. In July 1940, the Pere Marquette Railway Company sold the *Pere Marquette No. 19* for $24,000. The vessel was built from the same plans as the *Maitland No. 1* and was a sister ship of the *Pere Marquette No. 20*, referred to above. In March, 1942, the *Marquette and Bessemer No. 2* was sold for $37,724.04. She had been built in 1910 from the same plans as the *Maitland No. 1*, was jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Rail-

way Company and had formerly been used as a car ferry on Lake Erie (Finding 21, R. 13-14).

4. In addition to these findings as to the status of the Great Lakes demand for car ferries, the Court of Claims found that there was a demand in 1942 on the Atlantic Coast for vessels such as the *Maitland No. 1* for use as a car ferry between Florida and Cuba (Finding 20, R. 12).

In May, 1941, the Florida East Coast Railroad Company sold the *Henry M. Flagler*, a car ferry which had operated between Florida and Cuba, for $100,000. The *Flagler* was built in 1914 from substantially the same plans as the *Maitland No. 1* but was equipped to operate in and had been used in salt water. As in the case of the *Maitland No. 1* the *Flagler* had been laid up for ten years prior to the sale. Between May, 1941 and July 28, 1941, the purchaser expended $65,820 for necessary repairs. On July 28, 1941, the W.S.A. requisitioned the vessel and appraised her value at $170,000, which the owner accepted as just compensation (Finding 20, R. 12).

In June, 1942, the W.S.A. requisitioned two ocean-going car ferries, the *Joseph R. Parrott* and the *Estrada Palma*—comparable in age, dimensions and construction to the *Maitland No. 1*—which were owned by the Florida East Coast Railroad Company and had been operated by that company between Florida and Cuba. By negotiation between the parties, a value of $332,500 for each ves-

sel was agreed upon, and the company accepted $665,000 in full payment (Finding 20, R. 12-13).

Shortly after the cessation of hostilities in World War II, the Grand Trunk Railway Company sold the *Grand Haven*, a car ferry formerly operated on the Great Lakes, for $50,000. The *Grand Haven* was built in 1903, was smaller than the *Maitland No. 1* but had more speed and power. At considerable expense, the amount of which is not shown in the record, she was floated down the Mississippi River and converted for use as a ferry between Florida and Cuba (Finding 20, R. 12).

At the time of the requisition of the *Maitland No. 1*, it would have cost not less than $115,000 to move her to the Atlantic Coast and fit her for operation in salt water. In addition, some strengthening of the framing would probably have been required before the *Maitland No. 1* could be classified for ocean-going service. There is no evidence as to how much these additional changes would have cost (Finding 20, R. 13).

5. After making the foregoing findings, the court concluded, in its opinion, that the fair value for the *Maitland* must be determined as of the putative Florida location, and that since the sales transactions described above did not establish a sufficiently fair and adequate value for the vessel, resort must be had to other methods to establish her value (R. 22-23). Despite the fact that the *Maitland No. 1* had been laid up since June 1932, and respondent had filed an application with the

Interstate Commerce Commission on February 11, 1943, for leave to abandon its car ferry line because "traffic is not available in sufficient quantities to warrant continued operation, even if a suitable car ferry were available" (Finding 11, R. 8), the court declared "we are compelled to resort to a consideration of the earnings of the *Maitland No. 1* during the time the vessel was actually operated as a car ferry, in conjunction with the contemporaneous transactions in vessels of close similarity in determining a fair value" (R. 23).

Attributing an average mean residual value of $50,000 to the *Maitland No. 1* as an obsolete car ferry, the court capitalized the average annual income of $42,816.36 received from 1916 to 1932 at an annual rate of 10 per cent for the estimated 24 years of useful life remaining, and arrived at the sum of $389,767.15 (R. 23). The court then noted that "This figure approximates the amount paid by defendant [the United States] to Florida East Coast Car Ferry Company for the car ferries, *Joseph R. Parrott* and *Estrada Palma*" (R. 24). *Supra*, pp. 10-11. Since the normal useful life of a car ferry operated in salt water is only 80 per cent of such a ferry operated in fresh water, the court reduced the value of the *Maitland No. 1* by 20 per cent to $311,813.72. Next, the estimated necessary repairs of $34,980 (Finding 14, R. 9) were deducted. Finally, since it would have cost at least $115,000 to move the *Maitland No. 1* to the Atlantic Coast and fit her for salt water opera-

tion, that sum was also deducted, leaving a balance of $161,833.72 (R. 24). Although the court found that there had been an enhancement of $11,420 in the value of vessels on the Atlantic Coast between 1941 and 1942 because of the greater demand for vessels which occurred after the beginning of World War II (Finding 20, R. 13), such enhancement was ignored in making this computation.

The court, with two judges dissenting, concluded that the fair value at the time of taking was $161,833.72. Since petitioner was entitled to credit for the sum of $54,375 paid on June 10, 1944, interest was awarded respondent at 4 per cent per annum for delay in payment on $161,833.72 from August 20, 1942, to June 10, 1944, and on $107,458.72 from June 10, 1944 to date of payment (R. 24).

Judge Whitaker (with whom Madden, J. concurred) dissenting, was of the opinion that the capitalization of earnings was improper because "at the time of its requisition it was earning nothing and had earned nothing for quite a long time" (R. 24). Adverting to the price at which comparable vessels sold on the Florida East Coast, he pointed out that this basis for valuation "presupposes that the owner of this vessel on the Great Lakes would have been able to sell his vessel after he had transported it down there, and there is no showing whatever that it would have been able to do so. I feel quite sure that plaintiff would not have gone to the expense of $115,000 to transport

the vessel to the Florida East Coast in the hope of finding a purchaser there. Just compensation is to be determined not only as of the time of the taking but also as of the place of taking. * * * The War Shipping Administration fixed $72,500 as just compensation. I do not think the plaintiff has carried the burden of showing that this was incorrect" (R. 25).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In making an award of just compensation for the *Maitland No. 1* which was not based on a determination of the value the vessel had at the place of taking (the Great Lakes) but the value which it might have had if it were located on the Atlantic coast of Florida.

2. In making an award of just compensation for the *Maitland No. 1* (which was taken in August 1942), predicated upon a capitalization of respondent's realized earnings during the period from 1916 to 1932.

3. In making an award of just compensation for the *Maitland No. 1* which was not based on a determination of value at the time and place of taking.

4. In disregarding its findings of the evidentiary or primary facts in making its ultimate finding that "the fair value of the *Maitland No. 1* at the time of the requisition was $161,833.72."

5. In making an ultimate finding (that the fair value was $161,833.72) which was not sustained by its findings of the evidentiary or primary facts.

6. In failing to deduct, as required by Section 902 of the Merchant Marine Act of 1936, as amended, 46 U. S. C. 1242, from its ultimate finding of the fair value of the *Maitland No. 1*, the sum of $11,420 found to represent the enhancement of value due to the greater demand for vessels after the beginning of World War II.

7. In failing to make the ultimate finding that the fair value of the *Maitland No. 1* at the time and place of taking was no more than $72,500.

8. In failing to hold that respondent has not carried the burden of showing that the sum of $72,500 fixed by the War Shipping Administration as just compensation for the *Maitland No. 1* was incorrect.

9. In entering judgment for respondent in the amount of $107,458.72, with interest at 4 per cent per annum for delay in payment on $161,833.72 from August 20, 1942. to June 10, 1944, and on $107,458.72 from June 10, 1944 to the date of payment.

SUMMARY OF ARGUMENT

In fixing the fair value of the *Maitland No. 1*, the Court of Claims, disregarding the fact that the vessel could not be operated profitably as a car ferry on the Great Lakes and that its only value was for scrap or for secondary uses, fixed the value of the vessel by capitalizing past earnings, making

deductions therefrom for the cost of placing the vessel in a condition to operate between Florida and Cuba, and assuming a hypothetical situs for the vessel on the Florida East Coast. It undertook to fortify the value thus determined by relying upon a demand for a car ferry of the type of the *Maitland No. 1* in Florida and the Florida requisition-sale of two comparable vessels in 1942. It is submitted that this method of fixing fair value in a taking case has no basis either in law or reason.

1. The fixing of fair value is at the best an informed guess based upon the price on which an experienced buyer and an experienced seller would agree. If there is an active contemporaneous market, that normally furnishes the best evidence. Absent such a market, particularly in the case of a vessel, any value in excess of scrap must necessarily depend upon its prospective earning power, since no experienced buyer would purchase a vessel where no market for it existed and where there was no prospect of operating it profitably in the future. This is particularly true because of the high cost of maintaining a vessel for any extended lay-up.

In the instant case, the Court of Claims found that there was no market at the Great Lakes for a car ferry as such, nor any prospect that a car ferry of the type of the *Maitland No. 1* could operate at a profit in the future. It was unwilling to accept as a representative market the sales of comparable vessels for other purposes and proceeded to capi-

talize the past earnings of the *Maitland No. 1*, which earnings had ceased in 1932. It then made deductions from the figure so reached for the cost of repairing and equipping the vessel to operate in salt water, ascribing a Florida situs to it, and an ability there to operate at the same profit that respondent had realized from its operation on the Great Lakes prior to 1932.

Past earnings, of course, furnish no direct indication of present value. To the extent that earnings should be considered at all, it is only present and prospective earnings that have any relevancy, and past profits must be convincingly correlated to future earnings if they are to be admissible. In so far as the vessel's value at the Great Lakes was concerned, it had been laid up for ten years, and it was a liability, not an asset, without any prospect of further operation as a car ferry in that region.

Nor is there any evidence that respondent, or a purchaser, could or would have operated profitably in Florida. No evidence was introduced to show the earnings of comparable vessels and, much less, was any evidence introduced to show that respondent, or a purchaser, could have participated in that business. The history of similar vessels on the Great Lakes discloses that a close tie-up with a terminal railroad is essential to the profitable operation of the car ferry business. When the respondent operated profitably, it had such a tie-up, as it was in effect a subsidiary of the New York

Central and the Canadian Pacific railroads. There is nothing to show that respondent, or a new owner, had or could have obtained any working arrangement with comparable railroads in Florida. The net result of the method adopted by the court below is to establish the vessel's value on the basis of earnings that the *Maitland No. 1* might have had at some date prior to 1932. It was totally incompetent to establish value in 1942, the date of the taking.

2. In order to bolster the value for the *Maitland No. 1,* which it reached by capitalizing past earnings, the lower court relied upon its finding that in 1942 there existed a market for a vessel of that type in the Florida-Cuba car-ferry trade and that two comparable vessels which had been requisitioned by the United States in the same year had been valued by agreement of the parties at $332,500 each. As we read its findings and opinion it did not, however, find that this constituted a pertinent market nor did it ascribe that Florida value to the *Maitland No. 1,* and the decision below has no independent basis if the court erred in obtaining the vessel's value through capitalization of old profits. But the demand and sales in Florida in 1942 are irrelevant, either from the viewpoint of supporting the value reached by capitalizing past earnings or as establishing an independent market value for the *Maitland No. 1.*

It is settled law that value is to be taken as of the time and place of taking. The purpose of awarding just compensation is basically to treat the

owner of the requisitioned property with justice, and that end is achieved if he is paid the local value. Presumably, if he had desired to sell the article that is all he could have obtained. If he desired to replace the requisitioned article, he would be able to do so by purchasing a like article in the open market. If a greater value at some distant point is substituted therefor, it would normally result in a windfall to the owner. He could obtain that value and, if in excess of the local price, then replace the requisitioned article with one purchased at the place of the taking. There is nothing to show that respondent could not have done exactly that in the instant case.

Moreover, in a situation such as here presented where the owner is dissatisfied with an administrative determination of fair value, the burden is upon him to establish all elements necessary to support the higher valuation which he seeks. That burden petitioner has not met. It has not been found or established that the *Maitland* could not have been replaced at the Great Lakes or that respondent had any intention of taking the vessel to Florida, either for the purpose of operating or selling it. In these circumstances, we submit that even if the Florida valuation otherwise were a factor to be considered in determining fair value, respondent has failed to submit the supporting proof necessary to make that evidence relevant.

3. The fair value of $72,500 determined by the War Shipping Administration is both generous

and just. The scrap value of the *Maitland No. 1* at the time of the taking was $13,500. There was no market for it as a car ferry nor could any income be derived from its operation as such. Sales of five comparable vessels had occurred on the Great Lakes between 1936 and 1942, ranging in price from $24,000 to $65,000. These vessels had all been sold for uses other than that of a car ferry. We submit that these transactions represent the maximum value which the *Maitland No. 1* had. If these sales are inadequate to determine the potential market value for the *Maitland No. 1*, then no market for her existed at all on the Great Lakes and her value would only have been that of scrap, namely $13,500. In resolving this question in favor of respondent, we submit that the War Shipping Administration acted fairly and justly and that respondent should be limited to the value which WSA fixed.

ARGUMENT

In August 1942, the War Shipping Administration requisitioned the *Maitland No. 1*, a railroad car ferry belonging to respondent, at the Great Lakes, and fixed the sum of $72,500 as just compensation for the taking. Respondent was dissatisfied with this award and, as provided by statute, accepted seventy-five per cent thereof and brought suit in the Court of Claims to recover such additional sums as would, in its opinion, constitute just compensation. The court below found that at the time the *Maitland No. 1* was taken, she had been laid up for

eight years because the car transportation business for which she had been constructed had been diverted permanently to land routes; that there was no demand on the Great Lakes for a vessel such as the *Maitland* as a car ferry, the use to which she was best adapted; that the vessel had a scrap value of $13,500 at the time of the taking (R. 14); that she was adaptable for certain secondary, non-car ferry uses and there was a demand on the Great Lakes for such vessels for those secondary uses (R. 10) at prices ranging from $24,000 to $65,000 (R. 11, 13); that there was a demand on the Florida East Coast in 1942 for a vessel such as the *Maitland* for use as a car ferry between Florida and Cuba; and that the fair value of the *Maitland No. 1* at the time of the taking was $161,833.72 (R. 14). The Court of Claims' method of finding fair value was unique and unorthodox. It capitalized respondent's realized income from 1916 to 1932 from the operation of the *Maitland No. 1* on the Great Lakes and, despite the fact that the vessel had earned no income for over ten years because the business which had given rise to that income had disappeared, assumed, without finding or proof, that respondent would have realized such income in Florida. It then sought to bolster the value thus assigned to the vessel on a suppositious situs in Florida by relying upon a demand in 1942 for a vessel such as the *Maitland No. 1* on the Florida East Coast, some thousands of miles from the place of taking, and upon two requisition-sales in Florida of comparable

vessels at prices that somewhat approximated the value which it reached by capitalizing past earnings. We submit that these unusual rulings, which completely ignore the fair value of the vessel at the time and place of the taking, improperly depart from the accepted principles of fixing fair value in taking cases, and that the value of the *Maitland No. 1* fixed by the War Shipping Administration is fair and constitutes just compensation.

I

The Court Below Improperly Determined the Value of the *Maitland* by Relying Upon a Capitalization of the Realized Earnings of the Enterprise in Which She Was Used During the Period from 1916 to 1932 on the Great Lakes

A. The Fifth Amendment does not set forth any definite standards of fairness by which the measure of "just compensation" is to be determined and this Court has been careful not to reduce that concept to a formula. *United States* v. *Cors*, 337 U. S. 325, 332. The determination of just compensation is at best an "informed guess"—an approximation of what experienced traders, under no compulsion either to buy or to sell, would give or take for the property. Its accuracy depends upon the nature of the property and the available evidence of those factors which such experienced traders would consider. In an endeavor to find working rules that will do substantial justice, practical standards, including that of "market value," have been adopted. *Ibid.* Where the property concerned

is identical with, or similar to, units of property which are both contemporaneously and frequently traded, the standard of reference is the market price. *United States* v. *New River Collieries Co.*, 262 U. S. 341, 344; *United States* v. *Miller*, 317 U. S. 369, 374; *Kimball Laundry* v. *United States*, 338 U. S. 1, 6. However, where there is no such established market, recourse must be had to other standards to determine "market value."[2] Thus, consideration may be given to the cost of construction and, so far as relevant, acquisition cost, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant factors upon which a reasonable judgment as to value may be based.[3] These factors are given such weight as it may be presumed they would have in fair negotiations between an experienced seller willing to sell and an experienced purchaser under no compulsion to buy.

In ascertaining the fair value of a vessel, where no market value can be established, the starting point is its minimum value as scrap (in this case $13,500 at the time the vessel was requisitioned). Any value in excess thereof primarily depends on prospective earnings, as the vessel's fair value "ex-

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[2] Whether the sales have been sufficient in number or typical in character to establish a market is, of course, a question to be decided in each case and is not subject to generalization.

[3] See Rule 3, Report of the Advisory Board on Just Compensation to the War Shipping Administration, 1943 A. M. C. 1443.

ceeds its value as scrap only on the assumption that it is income-producing." *Kimball Laundry* v. *United States*, 338 U. S. 1, 9. The best evidence of the earnings of a vessel is the rate at which it can be chartered bareboat; otherwise, the business acumen of the owner or operator of the vessel can be separated only with great difficulty from the earning capacity of the vessel itself.[4]

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[4] It must be borne in mind that that which is requisitioned is not the business enterprise of the owner but a vessel which was used in the business. Whatever the merits of capitalization of income when an entire business enterprise such as a public utility is condemned (1 Bonbright, *Valuation of Property* (1937) ch. XI, XII, XVI, *passim;* Orgel, *Valuation under Eminent Domain* (1936) ch. XIV, XV, XVII-XIX, *passim;* cf. *Kimball Laundry* v. *United States*, 338 U. S. 1, 16), capitalization can be misleading when employed to estimate the value of property owned by the business enterprise. Cf. II Lewis, *Eminent Domain* (3rd ed. 1909) § 727; Nichols, *Eminent Domain* (2d ed. 1917), pp. 1171-1173 (realty). Before such evidence can properly be considered competent, measurable shares of the total earnings should be allocated to the representative income-producing factors of invested capital, management skill, and general business conditions. Without such allocation, it is apparent that awards of just compensation for identical units of property, if based on capitalization of earnings, would vary in accordance with the managerial skill of the owners thereof. Without such allocation, awards of just compensation might well differ for identical units of property under a single ownership. For example, sister ships owned by the same shipping company may be employed on routes which differ in their profitability. We think it clear that the law of just compensation does not call for such incongruous results. The Fifth Amendment requires that compensation be made for values which have an external validity, not for the property's subjective value to the owner. Cf. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377-378; *Kimball Laundry* v. *United States*, 338 U. S. 1, 5. If the technique of capitalization be deemed appropriate in any particular case, the proper subject of capitalization would appear to be the bareboat charter rate of the vessel rather than the earnings of the vessel. Cf. Orgel, *Valuation under Eminent Domain* (1936), pp. 533, 562, fn. 2 (rentals compared with business profits as evidence of market value of real estate).

Furthermore, a vessel which cannot be operated profitably is a source of constant expense to its owner, as it is necessary to provide wharfage, watchmen, and caretakers as well as a minimum upkeep during the period when the vessel is laid up. Such expenditures can be justified economically only on the expectation that the vessel may again become income producing.

And it is also plain that, in determining *present* value, the *capitalization of past income* of any type is meaningless as such, in the absence of a demonstrated correlation between the amount, type, and rate of past and future income. "When earnings have once been 'realized', so that they can be expressed with some approach to accuracy in the company's accounts, they are already water under the mill and have no direct bearing on what the property in question is now worth. Value, under any plausible theory of capitalized earning power, is necessarily forward looking. It is an expression of the advantage that an owner of the property may expect to secure from the ownership in the future. The past earnings are therefore beside the point, save as a possible index of future earnings." 1 Bonbright, *Valuation of Property*, p. 250. Even if no projection of future earnings is expressly made, "past earnings can be used as a basis of capitalization only on the assumption that they will continue." *Kimball Laundry* v. *United States*, 338 U. S. 1, 17, fn. 9.

B. In the instant case, the evidence conclusively established that the *Maitland No. 1* had no prospective earning capacity as a car ferry on the Great Lakes and the Court of Claims refused—we think erroneously, see *infra* pp. 33-42—to accept sales of comparable vessels there made for secondary purposes as establishing fair value. Therefore, in order to fix a value in excess of that made by the War Shipping Administrator, it felt "compelled to resort to a consideration of the earnings of the *Maitland No. 1* during the time that the vessel was actually operated as a car ferry * * *" (R. 23). By capitalizing the average annual income of $42,816.36 earned by respondent from 1916 to 1932 at an annual rate of 10% for the estimated remaining twenty-four years of use for the ship, and attributing an average mean residual value of $50,000 to it as an obsolete car ferry, the court obtained the basic sum of $389,767.15 (R. 23). Adjustments were then made to obtain a value for the *Maitland* based on a hypothetical Florida East Coast location, where a demand for car ferries did exist.[5]

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[5] No exception has been taken to the finding of the lower court that a demand did exist, at the time of taking, on the Florida East Coast for a vessel such as the *Maitland No. 1* for use as a car ferry (Finding 20, R. 12). But no finding was made nor was evidence submitted that this "demand" had reflected itself in the Great Lakes market. The only sale at the Great Lakes of a comparable vessel for Florida-Cuba operation occurred in 1945 at a price of $50,000 (R. 12). Moreover, it should be pointed out that the court made no finding that respondent would have been able successfully to engage in the business of car transportation in Florida nor that it would have been able to sell the vessel had it been transported there. See *infra*, pp. 28-30, 37-39.

Since the normal useful life of a car ferry operated in salt water is only 80% of one operated in fresh water, the court reduced the value of the *Maitland* by 20% to $311,813.72. Next, estimated necessary repairs of $34,980 were deducted. Finally, since it would have cost at least $115,000 to move the *Maitland* to the Florida East Coast and fit her for salt water operation, that sum was also deducted, leaving a balance of $161,833.72 as just compensation.[6] (R. 23-24.) *Supra,* pp. 12-13.

We submit that there is no basis in logic nor in law which supports the action of the court below in assigning a value to the *Maitland* grounded on capitalization of respondent's realized income from 1916 to 1932. In 1942, respondent had no current earnings nor any prospects of deriving any earnings from the *Maitland No. 1* as a car ferry. It had not operated its car ferry line since June 1932. At no time since that date has there been traffic sufficient to justify vessel operation (Finding 11, R. 8). Thus, in the absence of a showing of a bareboat charter market for the *Maitland,* it would appear that the *Maitland* had no value at all, other than salvage, unless it could be sold for a secondary use. It is inconceivable that a "willing buyer" would give any weight at all to such past earnings. If the *Maitland* had no market value as a car ferry because it could earn no income as a

[6] No deduction was made by the court below for the risk involved in transporting the ship to Florida. Cf. McCormick, *Damages* (1935), p. 182.

car ferry, it can hardly be urged that the value of the *Maitland* as a car ferry may, nevertheless, be measured by its past earnings.

We think it clear that respondent's ancient earnings offer no guide, on any theory, to the prospective income that might be derived from the *Maitland.* During the sixteen and one-half years of operation of the *Maitland,* the average annual net income of respondent fluctuated as follows: 1916-1921—$17,216.28; 1921-1922—net loss; 1925-1928—$129,893.92; 1930-1932—net loss (Finding 10, R. 6). On its face, such variation in income shows that respondent's earnings were not typical of the earnings of similar vessels but were the result of facts peculiar to respondent's ownership. The record shows that respondent's income was derived mainly from respondent's status as a subsidiary of the railroad companies which it served. Thus, its earnings varied with the adequacy of all-rail routes (R. 6-8). The record further shows that the bulk of the freight carried by the *Maitland* was coal; income fluctuated with the coal tonnage carried (R. 6). Plainly, earnings resulting from these factors are incompetent evidence of the earnings which might be earned by a vessel such as the *Maitland* as a car ferry between Florida and Cuba under entirely different operating conditions, and probably a different management.

In addition, there is no finding or evidence that respondent or any potential purchaser, could have engaged in the car ferry business between Florida

and Cuba at all, much less that it could have done so profitably. The findings in the instant case compel the conclusion that a close tie-up with one or more railroads is necessary for the successful operation of a car ferry (R. 6, 10, 19). For example, the Pennsylvania R. R. continues to operate a Great Lakes car ferry (R. 19) but it has never been suggested that respondent could take over all or any part of that business. During the period respondent operated profitably on the Great Lakes, it was a subsidiary of the Toronto, Hamilton and Buffalo Railway Company, whose stock in turn was owned by the New York Central and Canadian Pacific Railroads (R. 16). No other competed with it for that business. To assume that any car ferry could procure business in Florida in the absence of a working agreement with a terminal railroad there is to ignore realities.[7]

One final factor, ignored by the court below, further discloses the fallacy of its reasoning that the ship could have been engaged profitably as a car ferry, and that is that, if this were so, demand and earning capacity on the Florida East Coast for Great Lakes' car ferries would probably have reflected themselves in the Great Lakes market. While the court found that Great Lakes' car ferries had been sold and converted into ocean-going car ferries (R. 11) and that such ferries have proven

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[7] The case of the *He ; M. Flagler*, a Florida car ferry, which in 1941 was sold for $100,000 to a private purchaser who did not employ it in the car ferry business (R. 12) underscores this point.

satisfactory for car ferry service between Florida and Cuba (R. 12), it did not find when or the price at which these ferries were sold nor did the evidence before it throw any light on the subject. In the one instance in which evidence was available, the court found that a Great Lakes' car ferry, which was purchased in 1945 on the Great Lakes and transported to the Florida East Coast for use between there and Cuba, sold for $50,000 (R. 12). It is significant to note that that sale was to the West Indies Fruit and Steamship Company, which presumably had a car ferry business in which the purchased vessel could be employed. In view of all these factors, it is sheer speculation to assume that the *Maitland* as an ocean car ferry could equal its past income as a fresh water ferry, and, we submit, to fix its fair value on such a highly unrealistic and suppositious income, is totally unwarranted.

It is apparent, therefore, that the judgment below is, at most, an award of just compensation based on the value of the *Maitland* long prior to 1932, an award which the vessel's history after that date shows to be grossly erroneous for a 1942 taking. The judgment below thus violates the unquestioned rule that value is to be determined as of the time of taking. See *United States* v. *Miller*, 317 U. S. 369, 374; *Kieselbach* v. *Commissioner of Internal Revenue*, 317 U. S. 399, 403; *Danforth* v. *United States*, 308 U. S. 271, 283; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *Mononga-*

hela Navigation Co. v. *United States,* 148 U. S. 312, 341.

We therefore submit that the Court of Claims erred in determining just compensation for the requisitioned vessel by capitalizing respondent's past earnings.

II

A Demand Existing in Florida for a Vessel of the Type of the *Maitland*, and the Contemporaneous Requisition Sales of Two Comparable Vessels in 1942 in Florida, Furnish No Support for the Valuation Fixed by the Court Below Through Capitalization of Past Earnings

In order to fortify its finding of value based on its capitalization theory (*supra* pp. 12-13, 26-27), the court below adverted to its findings that a demand existed in Florida in 1942 for a vessel such as the *Maitland No. 1* and that two comparable vessels, which the United States requisitioned in the same year in Florida, had their value fixed by agreement of the parties at $665,000 for both or $332,500 for each (R. 21, 24). The court, however, did not rely upon these figures as establishing a firm Florida market value, nor did it attempt to fix the value of the *Maitland No. 1* by Florida market prices. Had it done so, the starting point of its calculations would have been $332,500 and not $389,767.15, the capitalized past earning figure upon which it rested. Moreover, although the court below found that there had been an enhancement of $11,420 in the value of vessels on the Atlantic Coast between 1941 and 1942 because of the greater demand for vessels which occurred after the beginning of World War

II (Finding 20, R. 13), such enhancement was ignored in making its computation. That sum would be subject to deduction under the doctrine of *United States* v. *Cors*, 337 U. S. 325, had the Florida sales been held to be the norm of fair value. It follows from the wholly secondary use made by the Court of Claims of the Florida demand that its decision cannot stand at all if the capitalization theory of valuation is incorrect. In any event—whether the findings as to the Florida demand are merely support for a valuation based on capitalization of past income or whether they are intended as an independent market valuation of the vessel—we submit that sales of comparable vessels in Florida are not evidence either of the prospective earning capacity of the *Maitland No. 1* nor of its value for the purpose of fixing just compensation for a Great Lakes taking.

A. The general rule is that just compensation for personal property must be determined as of the place of taking when there is a market for the commodity at that spot. See *United States* v. *New River Collieries Co.*, 262 U. S. 341, 344; *Davis* v. *Newton Coal Co.*, 267 U. S. 292, 301. Although recognized by this Court only in dicta, the rule finds firm support in the over-all law of damages. In actions for breach of contract, the market value at the time and place where the contract should have been performed is the basis for assessing damages, and, in cases of wrongful destruction of, or injury to, personal property, the market value of the place

of wrong is used. See McCormick, *Damages* (1935), § 47; 2 Sedgwick, *Damages* (9th ed. 1912), § 434; 3 Williston, *Sales* (Rev. ed. 1948), §§ 596, 597, 599, 599e. Since the purpose of the judgment in all these cases is to indemnify the plaintiff for his loss, without more,[8] an award of market value at the time and place of wrong or taking constitutes a fair measure of the loss because that is the sum for which the plaintiff would presumably have sold the property to another or could have replaced it for his own use. Market value at any place other than the place of taking is thus irrelevant, unless, of course, it is reflected in market value at the place of taking.

Here, the court below concedes that there were a number of uses for the *Maitland* for which a demand existed in 1942 on the Great Lakes (Finding 18, R. 10), and the findings reveal that (aside from the 1937 sale of the vessel itself) five vessels of the car-ferry type had been sold on the Great Lakes, during the period from 1936 to 1942, at prices ranging from $24,000 to $65,000 (Findings 18-21,

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[8] *Bauman* v. *Ross*, 167 U. S. 548, 574; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304; *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 126; *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S. 146, 155; *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *Miller*, 317 U. S. 369, 373; I Bonbright, *Valuation of Property* (1937), pp. 408-409; McCormick, *Damages* (1935), § 44; Restatement, *Contracts* (1932), § 329, comment *a*; 1 Sedgwick, *Damages* (9th ed. 1912), § 244; 5 Williston, *Contracts* (Rev. ed. 1937), § 1338; 3 Williston, *Sales* (Rev. ed. 1948), § 599.

R. 10-14).[9] *Infra,* pp. 39-42. But it disregarded this definite home market because there was no demand in that vicinity for the use to which the vessel was best adapted (R. 23). Since there was a demand on the Florida East Coast for such vessels for use as a car ferry, the court below concluded that the fair value for the *Maitland* must be based on a putative Florida location.

In reaching this result, the Court of Claims relied upon the language of this Court in *Olson* v. *United States,* 292 U. S. 246, 255:—"The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as a measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." *See* also *Boom* v. *Patterson,* 98 U. S. 403, 408; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 81; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 275; 2 Lewis, *Eminent Domain* (3rd ed. 1909) § 706; 1 Nichols, *Eminent Domain* (2d ed. 1917) § 219. But this language concerns the con-

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[9] In its unique method of calculating value by capitalization of past profits, the court below based its calculation on the value of an obsolete car ferry and assessed the latter value, which it characterized as "the average mean residual value", at $50,000 (R. 23). The residual value at the Great Lakes was for use as automobile ferries or bulk pulpwood carriers. Just how that "residual value" would attach to the hypothetical situs of the vessel at Florida, the court below does not explain. If the court had adopted the Florida sales as an independent basis of its valuation, it would have had to make a finding as to the vessel's residual value in Florida.

demnation of land; it should not be literally applied, as a formula, to cases involving the taking of personal property. Cf. *United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Cors*, 337 U. S. 325; *Kimball Laundry* v. *United States*, 338 U. S. 1, 15. As applied to land, the words "in the community" implicitly follow after the phrase "highest and most profitable use for which the property is adaptable and needed." In effect, the court below has substituted "anywhere" for "in the community." We think that substitution is unwarranted. True, there is an important distinction between land and personalty—personal property is mobile. If the owner of personal property wishes to sell his property, he may have a choice of markets.[10] If, because of peculiarities of market conditions at the location of his property, the value of it is less than its value in some other place, he may remove it to the more favorable spot. Thus, personalty may have as many market values as there are "markets", and its selling price is not necessarily circumscribed by the existing wants of the community in which it is located.

However, for eminent domain purposes, we submit that the only relevant market value is the value at the place of taking, at least in the absence of proof by the owner that he would actually have dealt in other places. Such market value fully

[10] The choice is, of course, very far from unlimited; it may be restricted by the owner's ability and desire to finance the cost and risks of transportation, and by the owner's knowledge of market conditions.

meets the standards of fairness and substantial justice which this Court has frequently held are the only basic measures of the compensation prescribed by the Constitution. Cf. *United States* v. *Miller,* 317 U. S. 369, 375; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 279, 280; *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377-378; *United States* v. *Cors,* 337 U. S. 325. As noted above, "the owner is to receive no more than indemnity for his loss." *United States* v. *Miller, supra,* at 375. Market value at the time and place of taking is the best measure of that indemnity because that is the sum for which the owner would presumably have sold the property to another or could have replaced it for his own use. To select the location of greatest value, as the Court of Claims did here, would grant a windfall to the owner who would receive more than he could probably have gotten from a private purchaser or than he would have had to pay for a replacement.

Even if the owner makes convincing proof that he would actually have sold his property in those other markets, it does not follow that he is entitled to a higher compensation. If the property could have been replaced at the place of taking, the owner is indemnified by an award of market value at that place. The law of just compensation requires that the owner be awarded the value of his property, not a profit on the property. "In absence of a statutory mandate * * * the sovereign must

pay only for what it takes, not for opportunities which the owner may lose." *United States ex rel. T. V. A.* v. *Powelson, supra,* at 281-282. And the price at which the owner could purchase a replacement certainly forms the maximum limit of the property's value.

Thus, we submit that the proper inquiry is not what might be the value of the property for a particular use if it were located at some other part of the country, but what it is worth at the place of taking, giving full consideration to the prospect of its being needed for the particular use in the reasonably near future, and to any other use to which it is reasonably adaptable. If a particular use does not affect the market price at the place of taking because of the character of the existing demand, the concept of just compensation as indemnification does not require that resort be had to other, distant markets.

B. On respondent rests the burden of proving all the elements of its claim for just compensation, particularly where, as here, it appeals from the adequacy of an administrative finding of value. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 273; *United States* v. *John J. Felin & Co., Inc.,* 334 U. S. 624, 631; *Westchester County Park Commission* v. *United States,* 143 F. 2d 688, 692 (C. A. 2); *Welch v. T. V. A.,* 108 F. 2d 95, 101 (C. A. 6); *Ralph* v. *Hazen,* 93 F. 2d 68, 70 (C. A. D. C.). It made no proof that it would have operated or at-

tempted to operate, or would have sold or attempted to sell, the *Maitland No. 1* on the Atlantic Coast of Florida. Owners of bulky property, like ships, do not ordinarily expend large sums (here, $115,000) for transportation to higher markets on the off chance that a sale might be made there at a better price. Nor did respondent make any showing that the *Maitland* could not have been replaced at the Great Lakes for the sum awarded by the War Shipping Administration as just compensation ($72,500). And there did exist a market on the Great Lakes, for secondary uses, in which respondent probably could have sold the ship. *Infra*, pp. 39-42. The Court of Claims made no finding that respondent would have been able to sell the vessel had it been transported to the coast, nor that respondent would have gone to the expense of placing the *Maitland* on the Florida market in the hope of finding a purchaser. The court likewise made no finding that a demand existed on the Great Lakes for vessels of this type to be transported to the Atlantic seaboard and fitted for operation as an ocean car ferry.[11]

We accordingly submit that the existence of a market for a vessel of the type of the *Maitland No. 1*, and the requisition-sale of two comparable vessels in Florida in 1942, formed no basis of support for the value assigned to the vessel by the court below,

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[11] In fact, the only comparable vessel that was acquired for such purpose sold for $50,000 (R. 12), less than the administrative award offered respondent. See *supra*, pp. 11, 26.

either when viewed as bolstering the value obtained, as it was, by capitalization of past earnings, or as independent evidence of a market in which the vessel could be sold.[12]

III

The Findings Disclose That the Value Assigned to the *Maitland* by the War Shipping Administration was Generous

The evidentiary findings of the Court of Claims reveal the existence of a definite home market for vessels such as the *Maitland No. 1*.[13] In addition to the repurchase of the *Maitland* by respondent in 1937 for $92,894.80 (Finding 12, R. 8), between 1936 and 1940 three car ferries similar to the *Maitland* were sold to the Michigan Highway Department for conversion to highway ferries. Of the three, two were built to the same plans as the *Maitland*. The first purchase made by the Michigan Highway Department was the smaller car ferry *Ann Arbor No. 4* in 1936 for $25,000. Identical in design with the *Maitland*, but somewhat older, were the *Pere Marquette No. 20*, purchased in 1938 for $50,000, and the *Pere Marquette No. 17*, purchased in 1940 for $65,000 (Findings 18, 19, R. 10-11). Be-

[12] If any effect was given to the Florida sales by the lower court, it erred in not deducting from the value it found for the *Maitland* the enhancement of $11,420 which occurred, as the court found, between 1941 and 1942 in the market price of vessels on the Atlantic Coast because of the greater demand for vessels after the beginning of World War II (Finding 20, R. 13). *United States* v. *Cors*, 337 U. S. 325.

[13] The court expressly found that in 1942 "there were a number of secondary uses for the vessel for which a demand did exist at that time" on the Great Lakes (R. 10).

tween 1940 and 1942, two other comparable car ferries, built to the same plans as the *Maitland,* were sold for conversion to the bulk carriage of pulpwood, the purchasers removing the engines and tearing off the superstructure of the vessels. In July 1940, the Pere Marquette Railway sold the *Pere Marquette No. 19* for $24,000; in March 1942, the *Marquette and Bessemer No. 2,* owned jointly by the Pere Marquette Railway and the Marquette and Bessemer Dock and Navigation Company, was sold for $37,724.04 (Finding 21, R. 13).

Thus, aside from the 1937 sale of the *Maitland* itself, five vessels of the *Maitland* type had been sold during the period 1936 to 1942 at prices ranging from $24,000 to $65,000. Although there were differences in the physical condition of these vessels, and varying amounts would have been needed to place them in operating condition as car ferries, we believe that these sales, nevertheless, establish a usable market value for the *Maitland.* The demand for the *Maitland* which the court below found to exist in 1942 at the Great Lakes was a demand for secondary uses and not for use as a car ferry (Finding 18, R. 10). Differences in the physical condition of these vessels in relation to their use as car ferries are, to a great extent, irrelevant to their market values as highway ferries or bulk carriers. Since the ships were sold for secondary uses, the only differences in condition which might materially affect market price would be the relative adaptability to these secondary uses. And it is

questionable whether those differences are critical. Although both Pere Marquette vessels were sold for comparable prices, being approximately the same age and in the same physical condition, $215,000 was spent in remodeling the *No. 20* and $534,000 on the *No. 17* for use as highway ferries (Finding 19, R. 11). [14]

We believe that these sales, although not numerous, are typical and do permit the court to make an "informed guess" as to the value of the *Maitland No. 1.*[15] Presumably, that value would be between $40,345, the average price paid on these sales, and $65,000, the highest price. It is significant that this corresponds closely with the book value of the *Maitland,* as shown on respondent's records on the date of requisition, which was $75,509.51 (Finding 15, R. 9). See fn. 1, *supra,* p. 6. And if we may make this appraisal with the benefit of hindsight,

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[14] The Court of Claims found that "In 1942, the *Maitland No. 1* could have been adapted for use as a highway ferry, for transporting automobiles and passengers on the Great Lakes or similar bodies of fresh water involving no greater length of haul. The vessel could have been converted for that purpose more economically and more quickly than for any other use, since the principal change that would have been required was the placing of an asphalt cover over the rails on the car deck to accommodate automobiles." (R. 10)

[15] As this Court has recently pointed out again, market value in eminent domain proceedings is not a fact but an appraisal postulated on a hypothetical sale. Since a transfer brought about by eminent domain is not a voluntary exchange, value can be determined only by a guess, as well informed as possible, as to what the price would have been had a voluntary exchange taken place. Cf. *United States* v. *Miller,* 317 U. S. 369, 375; *Kimball Laundry* v. *United States,* 338 U. S. 1, 6; 1 Bonbright, *Valuation of Property* (1937), pp. 59-60, 414; McCormick, *Damages* (1935) § 44; 1 Nichols, *Eminent Domain* (2d ed. 1917) § 217, 222.

it should be noted that, shortly after the cessation of hostilities in World War II, a comparable car ferry was sold on the Great Lakes for $50,000 for conversion for use as a car ferry between Florida and Cuba (Finding 20, R. 12). Since the sum fixed by the War Shipping Administration was $72,500, we submit that that sum is the maximum limit of the fair value of, and just compensation for, the *Maitland*.

If, however, these sales do not represent the price upon which an experienced seller and an experienced buyer would agree, then there is no pertinent evidence of value above the scrap value ($13,500). It is admitted that the vessel could not profitably be operated on the Great Lakes as a car ferry and no experienced buyer would purchase her for such purposes. If the sales for other uses are too infrequent to support a value for the vessel, then there was no market and the vessel could not be sold for more than its scrap value. Again, the experienced buyer would not pay a higher price for her on the off chance that he might eventually find a purchaser for a secondary use. The high cost of her upkeep during a prolonged lay-up would preclude that.

In these circumstances, we submit that the value fixed by the War Shipping Administration was generous, made full allowance for any value that the vessel had, and constituted just compensation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed and the case remanded to the Court of Claims with directions to enter judgment only for the unpaid twenty-five per cent of $72,500 awarded to respondent by the War Shipping Administration as just compensation for the taking of the *Maitland No. 1*.

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SEPTEMBER, 1949.

APPENDIX

Section 902 of the Merchant Marine Act of 1936, as amended, 53 Stat. 1254, 1255 (46 U. S. C. 1242) provides, in part, as follows:

> (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.
>
> * * * * *

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U. S. C., 1934 edition, title 28, secs. 41, 250).

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

No. ~~894~~ 39

THE UNITED STATES,
Petitioner,

v.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT

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SUBJECT INDEX

PAGE

Official Report of Opinion Below 1

Statement of the Case 1

Argument 5

Conclusion

The application for a writ of certiorari should be denied 7

Table of Cases

Monongahela Navigation Co. v. United States, 148 U. S. 312 5

United States v. New River Collieries, 262 U. S. 341 .. 5

United States ex rel. Tennessee Valley Authority v. Powelson, 319 U. S. 266 5

United States v. Miller, 317 U. S. 369 5

Washington Water Power Co. v. United States, 135 F. (2d) 541 5

Statutes Cited

Merchant Marine Act of 1936 (46 U. S. C.) Section 1242 1

Executive Orders

Order No. 9387—October 15, 1943 (8 Fed. Reg. 14105) 6

Reports

Report dated December 7, 1943 of Advisory Board on Rules for determining just compensation, appointed by Executive Order No. 9387—(Rule 4) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 624

THE UNITED STATES,

Petitioner,

v.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the Court of Claims is found at pp. 14-25, inclusive, of the record, and in Vol. 81 F. Supp. 237 of the reports.

Statement of Case

The War Shipping Administration appropriated from respondent, pursuant to the Merchant Marine Act of 1936 (46 U. S. C. 1242), its railroad car ferry "Maitland No. 1" (Finding 2; R. 4) and fixed $72,500 as fair value (Finding 3; R. 4). Respondent notified petitioner that said sum was unsatisfactory, and that it elected to receive 75 per

centum thereof, and to institute action to recover such further sum, as added to said 75 per centum, would constitute just compensation for the property taken (Finding 4; R. 4).

The Commissioner of the Court of Claims, before whom the issues were tried, found and reported the sum of $182,900 as the value of the Maitland at the time of requisition (R. 14). The Court of Claims, however, found the value of the Maitland was $161,833.72 (Finding 22; R. 14).

The only issue was the question of value at the time of appropriation by the War Shipping Administration. Finding that there was no current demand for a car ferry on the Great Lakes (Finding 18; R. 10) the Court considered the evidence of demand for such vessels at Florida and Gulf ports (Finding 20; R. 11) and predicated its award on the demand and market at such points with appropriate adjustment for the cost of transfer from the mooring on the Great Lakes to the area of demand. The Court fortified its conclusion by recourse to the record of past earnings (R. 23).

Although between 1936 and 1942 six Great Lakes' car ferries had been sold, the Court of Claims found that when sold they were obsolete for use as railroad car ferries; and were purchased for conversion to secondary uses, such as bulk carriers and highway ferries (Findings 18, 19, 21; R. 11, 14). The Court of Claims also found that such vessels when sold did not compare in age, physical condition, repairs required, and care with the Maitland (Findings 19, 21; R. 11, 13).

The Court also found that in June 1942, the United States acquired, by requisition from Florida East Coast Car Ferry Company, two car ferries, the Joseph R. Parrott and the Estrada Palma, which plied between Florida and Cuba, for a consideration of $665,000 for both, or $332,500 for each, fixed by the parties by open negotiation

and agreement, without recourse to litigation. These vessels were comparable in age, size, dimensions, engines, power, boilers, auxiliaries and type of construction with the Maitland (Finding 20; R. 12). As a means of establishing the value of the Maitland by the market value method, the Court found that these transactions furnished close equivalents (R. 21).

During the 16 year period of her operation by respondent the Maitland earned an average annual net profit, before taxes, of $42,816.36, a return of 10.41 per centum on investment (Finding 10; R. 6), and said sum when capitalized at 10 per cent for twenty-four years, the unexpired normal life remaining to the Maitland at the time of requisition, with a residual value of $50,000 at the expiration of such period, amounted to $389,767.15 (R. 23), an approximate equivalent to the sums paid by the United States for the ocean car ferries Joseph R. Parrott and Estrada Palma (R. 24). The Court found it necessary to consider the capitalization of net earnings of the vessel during the period of its operation in conjunction with the aforesaid contemporaneous transactions in vessels of close similarity in order to ascertain a fair value for the Maitland at the time of requisition (R. 23).

The Court's computation of such value was made as follows (R. 24):

Sound value for salt water operation		$389,767.15
Less adjustments for:		
20% shorter life in salt water	$ 77,953.43	
Cost of repairs	34,980.00	
Cost to move to Florida and convert to salt water use ..	115,000.00	
Total of adjustments		227,933.43
Value of time of requisition		$161,833.72

Since its last service as a freight car ferry across Lake Erie, the Maitland was carefully maintained; the Captain and Chief Engineer remained aboard as shipkeepers; steam was maintained and the engine turned over periodically; the marine engine and all auxiliaries were lubricated; the bright work was greased; additional help was hired when necessary, and minor repairs to prevent deterioration were made as required (Finding 13, R. 8).

The petitioner rested its claim that the value of the Maitland was $72,500, as administratively determined by it, solely on the bare evidence of the sales involving the six obsolete Great Lakes car ferries, unfortified by supporting evidence, by expert opinion or otherwise, to demonstrate how the value of $72,500 had been reconciled with the varying factors of age, physical condition, care and maintenance supplied, differences in size, power, machinery, auxiliaries, and equipment, repairs required to restore to sound and seaworthy condition, not to mention the difference in the prices realized from such sales, and the varying factor of scrap value ranging from the sum of $13,500 at the time of requisition to a sum ranging from $64,000 to $100,000 at the time of trial.

Four opinions of value were given by expert marine appraisers at the trial, two for petitioner, and two for respondent. Each of these four experts rejected the six sales as criteria for determining value by the market value method, and instead, based their opinions on other factors. One expert for the Government appraised the value of the Maitland at $145,000 at the time of requisition, based upon an estimated cost of reproduction at that time of $1,310,000 with a generous deduction for depreciation (S. M. 823-6; 842-50). The Government's other expert appraised the value of the Maitland at time of requisition at $152,400 predicated upon market value established by the transactions involving three salt water car ferries acquired by the United States (S. M. 477; 507; 526-38).

Obviously, as the Court said, the Maitland "had a value in excess of the value of [the six] obsolete car ferries even though it was not in actual operation in 1942" (R. 23).

Argument

1. It is not the function of the public representative, whether legislative or administrative, "to say what compensation shall be paid, or even what shall be the rule of compensation" (*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327). "The ascertainment of compensation is a judicial function" (*United States* v. *New River Collieries*, 262 U. S. 341, 343-4). The burden was not on respondent, as petitioner contends (Pet. Br. p. 15; item 8), to show that the tendered price of $72,500 set by the Maritime Commission was incorrect. It is enough that the property owner, the respondent here, has proved the value of his appropriated property (*United States ex rel. Tennessee Valley Authority* v. *Powelson*, 319 U. S. 266, 273).

2. When, because of factors special or peculiar to the situation, as in this case, there is no evidence of proper sales at the place of requisition by which to establish value, resort may then be had to other methods and other evidence to establish the value of the property taken (*United States* v. *Miller*, 317 U. S. 369, 374; *Washington Water Power Co.* v. *United States*, 135 F. (2d) 541, 542).

The Court considered, (1) the demand for vessels such as the Maitland as a salt water car ferry between Gulf and Florida ports and Cuba, (2) the prices paid by the Government for comparable vessels in that service; and (3) the capitalized earnings of the Maitland. On this premise the Court concluded that these factors, with due allowance for repairs, depreciation and cost of transfer, resulted in a value of $161,833.72.

3. Petitioner's claim that the Court of Claims erred in failing to apply value at the place of taking in determining the value of the Maitland (Pet. Br. p. 14; Item 3), is but a refinement of its main argument that value should have been measured solely by the prices realized from the sales of the six obsolete Great Lakes car ferries. Implicit in such claim, as with petitioner's main contention, is a denial of the validity of the Court's finding of fact that the prices realized from the sales of the six obsolete car ferries represented value for a secondary and degraded use of the Maitland rather than the highest, most profitable use for which it was suitable and adaptable (R. 23).

4. By Executive Order number 9387, dated October 15, 1943 the President appointed an advisory board to establish rules for the guidance of the War Shipping Administration in determining the just compensation to be paid for requisitioned vessels (8 Fed. Reg. 14105). The Advisory Board in its report made on December 7, 1943 stated, among other things, that just compensation should not include enhancement due to the Government's need of vessels which had necessitated the taking (Rule 4). The United States paid the owner of the Joseph R. Parrott and the Estrada Palma on June 2, 1945 (S. M. 536) and unquestionably, pursuant to the report of the Advisory Board, such payment excluded anything for enhancement. The value of the Maitland, based upon such prices, likewise excluded anything for enhancement. No deduction for enhancement need be made from a value which itself excludes anything for enhancement. The Court of Claims very properly refused to make any deduction for enhancement from the value which it had fixed for the Maitland.

5. Petitioner's brief (pp. 22, item b) suggests the pendency of other appropriations of Great Lakes vessels as affected by the determination in this case. So far as is known and so far as appears none of the other cases in-

volves a railroad car ferry, and obviously, there is no similarity in the elements or factors on which the value of the Maitland was determined.

CONCLUSION

The application for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 39.

39

THE UNITED STATES,

Petitioner,

v.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

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THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Statement	1
Summary of Argument	4
Argument	5
I. The Court of Claims properly determined the value of the "Maitland" by reference to a combination of factors, in the absence of a market at the place of taking	5
II. The valuation of mobile personal property is not restricted to the market at the place of taking	6
III. The award appealed from is sustained by the findings	7
Conclusion	10

TABLE OF AUTHORITIES:

Cases:

Ewen v. *Peoria & E. Ry. Co.*, 78 F. Supp. 312, cert. denied 336 U. S. 919	10
Kimball Laundry Co. v. *United States*, 338 U. S. 1	5
Sprockels-Rosenkrans Inv. Co. v. *Lewis*, 146 Fed. (2d) 982	10
Standard Oil Co. v. *So. Pacific Co.*, 268 U. S. 146	5
United States v. *Cors*, 337 U. S. 325	10
United States v. *Miller*, 317 U. S. 369	5

Statutes:

Judicial Code, Section 1255, 28 U. S. C. 1255(1)	1
Merchant Marine Act of 1936, 46 U. S. C. 1242	1

Other Authorities:

Report of Advisory Board on Just Compensation, Rule 3	5
1 Sedgwick, *Damages* (9th ed.) Sec. 246	7

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THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

This is an appeal by the United States from a judgment of the Court of Claims entered on December 6, 1948, on writ of certiorari granted by this Court on May 2, 1949 (336 U. S. 965). The opinion of the Court of Claims is reported at 81 F. Supp. 237. The jurisdiction of this Court is invoked under the provisions of Section 1255 of the Judicial Code, 28 U. S. C. 1255 (1).

Statement.

The War Shipping Administration appropriated from respondent, pursuant to the Merchant Marine Act of 1936 (46 U. S. C. 1242), its railroad car ferry "Maitland No. 1" and fixed $72,500 as fair value (Finding 3; R. 4). Respondent notified petitioner

that said sum was unsatisfactory and elected to sue the United States to recover the sum of $711,753 as just compensation for the vessel (R. 3; Finding 4; R. 4).

The Court of Claims found that the fair value of the "Maitland No. 1" at the time of the requisition was $161,833.72 (Finding 22; R. 14).

At the time she was requisitioned the use to which the "Maitland No. 1" was best adapted was as a car ferry on the Great Lakes, the use for which she had been built. At that time, however, there was no demand for a vessel as a car ferry on the Great Lakes (Finding 17; R. 9, 10) and therefore no market established by transactions in comparable vessels.*

Under the circumstances, the court had to turn to methods other than the market value at the place of taking to establish the value of the property taken (R. 22).

There was a demand for a vessel such as the "Maitland No. 1" for use as a car ferry between Florida and Cuba, as shown by the fact that in June 1942 the

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* The petitioner argued and continues to argue (Petitioner's Brief, pp. 2, 7-10, 16, 20, 26, 33-34, 39-42) that sales on the Great Lakes of five obsolete car ferries which had been permitted to deteriorate to such condition that hundreds of thousands of dollars would have been required to restore them to usefulness (Findings 18, 21; R. 11, 13-14) established a "market" applicable to the "Maitland No. 1", which had at all times been kept in operating condition and repair (Finding 13; R. 8) and by agreement of both parties required the expenditure of less than $35,000 to place her in full operating condition (Finding 14; R. 9). The court's ultimate finding that these sales did not establish a market value for the "Maitland" is amply supported by the unchallenged findings of fact with respect to the disparity between the condition of the "Maitland No. 1" and the condition of the other five vessels and between the cost required to place the "Maitland" in operating condition and the cost required to place the other five vessels in operating condition.

War Shipping Administration requisitioned from the Florida East Coast Car Ferry Company two ocean-going car ferries, the "Joseph R. Parrott" and the "Estrada Palma", both comparable in age, size, dimensions, engines, power, boilers, auxiliaries, and type of construction to the "Maitland No. 1". By negotiation between the United States and the Florida East Coast Company the parties agreed upon a value of $665,000 for both vessels (Finding 20; R. 11-13).

During the 16-year period of its operation respondent's average annual income from the "Maitland No. 1" amounted to $42,816.36 (Finding 10; R. 6).

The sales on the Great Lakes of the obsolete and deteriorated car ferries represented their residual values for secondary uses, and produced an average residual value of $50,000 (R. 23).

By taking this residual value of $50,000 and capitalizing the average annual earnings of the "Maitland No. 1" at 10% for the term of its unexpired normal life the court arrived at an amount of $389,767.15 (R. 23), an approximate equivalent to the sums paid by the United States for the ocean car ferries "Joseph R. Parrott" and "Estrada Palma" (R. 24).

From the figure so found the Court of Claims deducted amounts representing the cost of moving the vessel to Florida and converting to salt water use, the agreed cost of repairs, and the shortened life in salt water, and arrived at its net awarded value of $161,833.72.

Summary of Argument.

The petitioner asserts that the Court of Claims erred by fixing valuation through capitalization of past earnings; by consideration of a demand existing in Florida for a vessel of the type of the "Maitland" as shown by the contemporaneous requisition of two comparable vessels in Florida; and in failing to fix a value of the "Maitland" on the basis of sales on the Great Lakes of vessels of the same type but in far poorer condition than the "Maitland".

1. Petitioner misconstrues the holding of the court. The court did not award the capitalized value of the earlier earnings of the vessel, but merely used capitalization of earnings as a starting point "in conjunction with the contemporaneous transactions in vessels of close similarity" (R. 23), a proper method of approach in the absence of an established market at the place of requisition.

2. The court properly considered the requisitioning of comparable vessels in Florida as one element of its findings, and awarded a sum of approximately half the amount of the requisition sales. The value of an article of mobile personal property may be determined by reference to a market at a place to which it can be moved, with appropriate deductions for the cost of moving and other necessary expenses; its valuation is not restricted to a market at the place of taking.

3. The finding by the court that the sales relied on by petitioner did not constitute an established market is required by the primary facts.

ARGUMENT.

I.

The Court of Claims properly determined the value of the "Maitland" by reference to a combination of factors, in the absence of a market at the place of taking.

While the ordinary method of estimating the value of requisitioned property is by reference to a market established by numerous sales at the place of taking, in the absence of such a market other factors must be taken into consideration. *United States* v. *Miller*, 317 U. S. 369, 374; *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S. 146, 155. Among the recognized factors which may be considered is the capitalized value of earnings. *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 16; Report of Advisory Board on Just Compensation, Rule 3.

In this case the court used capitalization of earnings only as a starting point. The average annual earnings of the "Maitland" during the 16-year period of its operation amounted to $42,816.36 (Finding 10; R. 6).

Petitioner's principal argument, supported by citation of numerous authorities for the proposition that the validity of valuation by the capitalization method depends on a showing of current or prospective earnings, misconstrues the holding of the court. The principle cited has no application to the issue before this Court for the reason that the Court of Claims did not, as petitioner contends, make an award in the amount of its capitalization of past earnings.

The capitalized value of the past earnings was $389,767.15. The award was $161,833.72.

As the court pointed out, it considered this capitalized figure only in conjunction with contemporaneous transactions in other similar vessels. It clearly did not arrive at its award by capitalizing the actual earnings (R. 23).

II.

The valuation of mobile personal property is not restricted to the market at the place of taking.

The court checked the amount at which it had arrived by capitalization of earnings against valuations agreed upon by negotiation between petitioner and the Florida East Coast Car Ferry Company. In June 1942 the War Shipping Administration requisitioned from the Florida East Coast Car Ferry Company two ocean-going car ferries comparable in all respects with the "Maitland". By negotiation between the United States and the Car Ferry Company a value of $665,000 for both vessels was agreed upon (Finding 20; R. 11-13), an amount approximating the amount arrived at by capitalization of the "Maitland's" earnings (R. 24).

The authorities cited by petitioner for the principle that the value of property taken is to be determined as of the time and place of taking are not here applicable since they relate to real property, or interests in real property, which have a fixed situs.

"If there is no market for the article at the place where the plaintiff would be entitled to compensation, the value at the nearest market governs." 1 Sedgwick on Damages, Ninth Edition, Sec. 246. We agree with petitioner's statement of the true rule with respect to mobile personal property that "personalty may have as many market values as there are 'markets', and its selling price is not necessarily circumscribed by the existing wants of the community in which it is located".

The court did not award the sum for which the comparable vessels requisitioned by the government had been agreed upon, namely, $332,500 each, but awarded only $161,833.72. The court's award was arrived at by deducting from its capitalized value on the Great Lakes the expenses of repairing the vessel, moving it to Florida, converting it to salt water use, and allowing for the shorter life due to use in salt water.

III.

The award appealed from is sustained by the findings.

The petitioner argues that the court should have used the sales of the obsolete and deteriorated vessels on the Great Lakes as establishing a market value. The soundness of the court's ultimate finding to the contrary is shown by the evidentiary findings.

The "Maitland", which was built in 1916 (Finding 6; R. 5), retained a captain and chief engineer on board as shipkeepers during the entire time she was laid up. "One of the boilers was fired up every winter and the engines were turned over periodically.

The main and auxiliary engines were kept lubricated, the bright work was greased and minor repairs, of the kind needed to keep the vessel from deteriorating, were made from time to time" (Finding 13; R. 8). The agreed cost of repair required to place her in operating condition was only $34,080 (Finding 14; R. 9).

The "Pere Marquette No. 17" and the "Pere Marquette No. 20", which were built in 1901 and 1903, respectively, were in a much poorer state of repair than was the "Maitland No. 1" on the date of the requisition (Finding 18; R. 11).

Nothing was spent for maintenance of or repairs to the "Pere Marquette No. 20" from the time she was laid up until the date she was sold for $50,000. As early as 1936, the owners estimated that it would cost $173,700 to place her in operating condition for use as a car ferry for a period of only five years. The Michigan Highway Department spent $215,000 for repairing and remodeling her (Finding 19; R. 11).

The "Pere Marquette No. 17" was sold to the Michigan Highway Department for the sum of $65,000. In 1936 the owners estimated that an expenditure of $147,200 would have been required to place her in operating condition as a car ferry for a period of five years. The Highway Department expended $534,000 for remodeling and reconditioning this vessel (Finding 19; R. 11).

The owners of the "Pere Marquette No. 19" estimated, just before she was sold in 1940 for $24,000, that an expenditure of $308,000 would be needed to put her in operating condition.

The "Marquette & Bessemer No. 2", built in 1910, was sold for $37,724.04. Prior to the sale the owners

estimated that it would take an expenditure of $300,000 to place her in condition to operate (Finding 21; R. 14).

The "Ann Arbor No. 4" and the "Grand Haven" were both smaller than the "Maitland No. 1", and there was no evidence as to their condition. Thus their sales do not form a proper basis for determining the value of the "Maitland No. 1".

The sales prices realized for all these hulks (called residual value) could not establish a market applicable to the "Maitland".

Indeed, while not expressly stated in the opinion or findings of fact of the Court of Claims it seems clear that the consideration of the sales prices of these deteriorated car ferries and of the amounts required to put them in proper operating condition as compared with the amount required for conditioning the "Maitland" furnished further support for the award made for the "Maitland".

The argument that the value assigned to the "Maitland" by the War Shipping Administration was generous is completely refuted by the petitioner's own evidence offered on direct examination of the expert witnesses called by it. If any error was made by the Court of Claims such error was favorable to petitioner; the evidence would sustain a much higher award, since the Court of Claims made no finding with respect to the proof of value based upon reproduction cost less depreciation testified to by witnesses for both parties.

The amount for which the owner saw fit to insure the "Maitland" while she was laid up and not exposed to the perils of navigation is no criterion of value; the actual amount of insurance carried is a far

different thing from the "appraisals for insurance or other purposes" approved as a test of value by the Advisory Board on Just Compensation. Neither is the value at which property is carried on the books of its owner of any weight in determining true value. *Spreckels-Rosenkrans Inv. Co.* v. *Lewis,* 146 Fed. (2d) 982; *Ewen* v. *Peoria & E. Ry. Co.,* 78 F. Supp. 312, 331; cert. den. 336 U. S. 919.

The contention that the court should have deducted from its award the sum of $11,420 representing the enhancement of values of vessels on the Atlantic coast between 1941 and 1942 is not sustained by the case of *United States* v. *Cors,* 337 U. S. 325, since in the *Cors* case the holding of the majority depended upon a finding of fact that the enhancement in value was due to "the Government's need for vessels", and there is no such finding in this case.

CONCLUSION.

We respectfully submit that the judgment awarded by the Court of Claims was based upon proper methods of appraisal and should be in all respects affirmed.

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